BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINION BELOW.

The opinion of the Supreme Court of Missouri is reported in 148 S. W. 2d 773, and appears in the record at page 675. There was no opinion by the trial court.

STATEMENT OF THE CASE.

A sufficiently full statement of the case and of the jurisdictional grounds therefor has been made in the foregoing Petition. For brevity's sake, it will not be repeated here.

SUMMARY OF THE ARGUMENT.

I.

The evidence shows that, as a matter of law, Cooper was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act so that the Act applies in this case. Cooper was, when hurt, engaged in switching an intrastate car to be made part of an interstate train, the movement toward which had already begun. The act of weighing the sand car was an act necessary to prepare the car for transportation on an interstate train, and thereby was to aid and further the movement of that train.

II.

If the Federal Act applies, Cooper assumed the risk of his injury as a matter of law. The construction and maintenance of tracks 9 and 10 in such close proximity to each other was not negligence. Cooper's knowledge of this spacing was at least equal to petitioner's and it owed him no duty in this respect. The risk of injury there-

fore was an ordinary one incidental to his employment and assumed by him. Even if the construction and maintenance of the tracks in such a manner were negligence and, therefore, an extraordinary risk, Cooper fully knew and appreciated its danger and therefore assumed it.

III.

If the Federal Act applies, but the evidence does not show Cooper's assumption of the risk as a matter of law, that question and the question of Cooper's contributory negligence should have been submitted to the jury, as petitioner requested, under appropriate instructions, since there is substantial evidence of both defenses.

ARGUMENT.

I.

The Evidence Shows That, As a Matter of Law, Cooper Was Engaged in Interstate Commerce Within the Meaning of the Federal Employers' Liability Act So That the Act Applies in This Case, Because Cooper Was, When Hurt, Engaged in Making Up an Interstate Train, the Movement Toward Which Had Already Begun.

Section 1 of the Federal Employers' Liability Act (Act of April 22, 1908, Ch. 149, Sec. 1, 35 Stat. 65; 45 U. S. C. 51) provides:

> Every common carrier by railroad, while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works * * * or other equipment.

This Court formulated the test for determining whether the employee in any given case comes within the Act in *Shanks* v. *Delaware, L. & W. R. R. Co.*, 239 U. S. 556, l. c. 558:

> Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion * * * and that the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it.

In *New York Central & H. R. Co.* v. *Carr*, 238 U. S. 260, the same test was stated differently, l. c. 263:

> Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employee is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof.

Does the evidence in this case satisfy this test? Clearly it does. The sand car had been billed and assigned for transportation to Emporia. Its appearance on the "west check" was a definite direction to Vandeventer, the foreman, that it must go there on either No. 29 or No. 91 (R. 261, 266, 296, 356). The only thing necessary to complete its billing on one of the two trains was affirmative action by the foreman—some positive, unequivocal step, distinguished, perhaps, from a mere unexecuted intention, toward making the car a part of one train or the other. Vandeventer had taken that step. He had not only decided to put the sand car on No. 29; the crew had actually begun the switch movement to do that very thing. When that movement began, the sand car was definitely, completely and finally billed and assigned for transportation on No. 29.

Thus, this case is one in which the employee was injured while moving a car for the very purpose of putting it into and making it a part of a train running from St. Joseph, Missouri, to Emporia, Kansas, and carrying cars destined for places outside Kansas. His activity was designed and intended to aid and facilitate the movement of that train by placing cars to be made a part of it on the track on which it was to be made up. Where the employee is injured while engaged in making up an interstate train, applicable decisions make it plain that he is engaged in interstate commerce within the Act.

Pennsylvania R. Co. v. *Morrison*, 6 Cir., 3 F. 2d 986, is squarely in point. Deceased was the brakeman of a switch crew in defendant's yards. Just prior to the accident, the crew had pulled out from a train a car loaded with intrastate freight. The purpose of the movement (and the conductor had received such orders) was to place that car on a classification track where it would be gathered into a train leaving once in 24 hours for another classification yard ten miles away. The accident, a collision, happened while the switch engine was pushing the single car toward the classification track and, but for the accident, the car would, along with other cars, many of which were destined to points in other states, have become part of this train. The Court held that, as a matter of law, deceased was engaged in work so closely related to interstate commerce as to be practically a part of it. Judge Mack said, l. c. 986:

> We reach this conclusion * * * because at the very moment of the collision it was moving towards track No. 2 for the very purpose of forming part of a once in 24 hours train, to depart within a few hours, ordinarily and when it so departed in fact hauling cars some of which were in interstate transportation. For as to such cars every movement, whether a switch within one yard or between two classification yards, or a haul either from the point of origin or to the point of destination, forms a part of the entire interstate transportation. And railroad employees engaged in the act of moving an intrastate car for the very purpose of causing it to become part of such a train participate in, further and facilitate the interstate work.

The Supreme Court of Missouri said (R. 682) that the decision in the Morrison case was limited to a switch movement made for the "very purpose of connecting with interstate cars." No such limitation was made by the Court or supported by the testimony. There the yardmaster could not testify positively which, if any, of the cars which subsequently left with the train were on

track 2 at the time of the accident; he only testified that "some were undoubtedly there." He did not testify whether the cars that were there were interstate or intrastate cars. The train which left 3-3/4 hours after the accident and to which the moving car was to have been attached, contained, when it left, some interstate cars, but there was no testimony showing when they were switched onto track 2—whether before or after the switching operation began in which Morrison was hurt. The car on which plaintiff was hurt may have been the first car being switched to track 2, or all the cars then on track 2 may have been intrastate cars. Either fact is immaterial. The important facts are that the car being switched was to be made a part of the train, and that the train, when it departed, possessed an interstate character because it carried interstate cars.

In *Baltimore & O. R. Co.* v. *Darling*, 6 Cir., 3 F. 2d 987, plaintiff, a brakeman, was engaged in riding an intrastate car over the "hump," or gravity track, to classification track 14. He was to control the car by means of a brake, to prevent collision with other cars on track 14, which, at the time of the accident, was nearly full of cars, intrastate and interstate, all of which were, a few hours later, formed into an interstate train. Plaintiff testified that at the time he was hurt he was engaged "in building a train on track 14." The Court held there was ample evidence that plaintiff was engaged in interstate transportation, even though there was a possibility that the car might subsequently be cut out of the drag, because plaintiff (l. c. 988) "was controlling the movement of the car for the very purpose of making it a part of an interstate train soon to move on in interstate commerce."

Pennsylvania R. Co. v. *Logansport Loan & Trust Co.*, 7 Cir., 29 F. 2d 1, is alike in principle, although the movement there was to attach the car to interstate cars,

rather than to make it a part of an interstate train. Deceased, a switchman, was engaged in a switching operation to pull a defective car from a cut of cars and transfer it to the repair shop. On track 47 there were 27 cars, the last of which was defective. The cut was put on a lead track, where, in an attempt to unchain the defective car, deceased was crushed. The intended movement was to return the other 26 cars to track 47, take the defective car over to track 57, there couple it to the cars on that track and proceed with all of them to switchyard C, dropping the defective car at the repair shop in yard B. Some of the cars on track 57 were from places without the state. The Court held that there was sufficient evidence that deceased was engaged in interstate transportation, saying, l. c. 2:

> The evidence * * * is sufficient upon which to base a finding that the cut on track 57 was composed of interstate cars, * * * At the time he received his injuries he had entered upon and was engaged in a movement of the engine and crew which involved and embraced the moving of interstate cars in interstate transportation. This brought the case within the Employers' Liability Act.

To the same effect are:

Birmingham Belt R. Co. v. *Dunlap*, 5 Cir., 58 F. 2d 951.

Grand Trunk Western Ry. Co. v. *Reid*, 6 Cir., 42 F. 2d 403.

This Court has never had occasion to pass upon the applicability of the Act to facts exactly paralleling those in this case. In numerous cases, however, this Court has at least impliedly approved the principle that one engaged in making up an interstate train is engaged in interstate transportation. *Jacobs* v. *Southern Ry. Co.*, 241 U. S. 229, is very close on its facts. The character of Jacobs' employment apparently was not questioned in this Court and it was assumed that he was within the Act. The Supreme Court of Virginia had so held (81 S. E. 99). Jacobs was

engaged with a crew in shifting cars in the Lawrenceville, Virginia, yards. The particular cars attached to the engine at the time of the accident were intrastate. However, the object of the movement was (81 S. E. 100) "the making up of a train to which cars were to be attached which came from points beyond the southern limits of the state and were destined to points beyond the northern limits of the State." So here the object of the switch movement was the making up of a part of an interstate train, to which were to be attached cars destined for points outside Kansas.

Previously, this Court had also assumed, without deciding, that in a similar case the employee was engaged in interstate transportation. *Norfolk & Western Ry. Co.* v. *Earnest,* 229 U. S. 114. Earnest, walking ahead of and piloting a locomotive through several switches to the main track where it was to be attached to an interstate train to assist it in moving over a grade, was struck and injured by the engine. See also *Grand Trunk Western Ry. Co.* v. *Lindsay,* 233 U. S. 42.

St. Louis, S. F. & T. Ry. Co. v. *Seale,* 229 U. S. 156, while not alike in facts, illustrates the application of the principle which we contend applies here—namely, that one engaged in work which has as its object the furtherance of the movement of an interstate train by placing a car or an engine to be made a part of it or by inspecting it or by doing any act calculated to facilitate its movement is so directly connected with interstate transportation as to be practically a part of it. In the Seale case, deceased was a car checker and yard clerk in the Sherman, Texas, yards. His duties were to examine incoming and outgoing trains and make a record of the numbers and initials on the car, etc. While he was on his way through the yard to one of the tracks to meet an incoming freight from Oklahoma, he was struck and killed by a switch engine. This Court held that, as a matter of law, he was engaged in interstate transportation because the train

from Oklahoma was engaged in the movement of interstate freight and (l. c. 161) "the duty which deceased was performing was connected with that movement, not indirectly and remotely, but directly and immediately."

This Court has held that the switching or "setting out" of intrastate cars from an interstate train is activity covered by the Act. *New York Central & H. R. Co.* v. *Carr,* 238 U. S. 260; *Seaboard Air Line Ry.* v. *Koennecke,* 239 U. S. 352. Conversely, the switching or "picking up" of intrastate cars to be made a part of an interstate train should likewise be within the Act.

In Roberts, Federal Liabilities of Carriers, Vol. 1 (1st Ed.), Sec. 500, p. 866, the text reads:

> The federal act governs the liability of railroad companies to employees injured while "breaking up" or "making up" trains containing interstate traffic in railroad yards; for the transportation in interstate commerce includes switching movements as well as main line traffic. For example, a fireman on a switch engine at the time he was injured was engaged in shifting cars in a railroad yard. The cars which were attached to the engine at the moment of the accident were used solely in intrastate commerce, but the shifting and the movement of these cars were necessary for the purpose of making up a train to which cars were to be attached which came from points beyond the state and were destined to points in another state. The fireman's remedy was under the federal act. A car inspector injured while coupling the air hose on a string of cars which were to become a part of a train then being made up in a yard was employed in interstate commerce. An engineer engaged in switching cars from a train at a terminal point preparatory to placing the cars in the yard was within the federal act while so employed. A member of a switching crew engaged in switching cars between two points in the city of Indianapolis for the purpose of being made up into an interstate train was employed in interstate commerce. A switchman assisting in distributing cars from an interstate train and clearing the track for another interstate train has no remedy under a state law.

These authorities make it clear that Cooper's services were primarily, directly and substantially concerned with interstate transportation because the movement in which he was engaged when he was hurt was a movement whose purpose was to place the sand car in an interstate train. It was, therefore, interstate in character from its very beginning.

The Supreme Court of Missouri said (R. 682) that the record "particularly" failed to support petitioner's contention that the movement of the sand car was "to track No. 2 or, for that matter, to any specific track." Petitioner concedes that Vandeventer did not *specifically* testify that he intended to move this car to track 2 or any other specific track. He did testify, however, that, as a rule, No. 29 was made up on track 2 (R. 369, 381). All of the cars to go from Topeka on No. 29 were switched to track 2 and when No. 29 arrived on a different track, all of the cars on it to go west of Topeka were switched by Cooper's crew to track 2 to complete the train, so that, customarily, the whole train was made up on track 2 (R. 369, 381-2). This testimony is sufficient to establish as a fact that track 2 was the track to which the sand car was to be switched for No. 29. There is no suggestion in the testimony that it was not the track, or that any other track was to have been used, or that the usual procedure was not to have been followed in this particular operation.

In any event, we deem it unnecessary to establish *by number* any specific track to which the switch was to be made. Obviously, Vandeventer was not going to switch the sand car aimlessly about the yards. He said the purpose of the movement was to put that car in No. 29 (R. 336, 338, 341, 347). He knew to what track he wanted to take it to put it in No. 29, whether it would be track 2 or some other track, and he was on his way there when Cooper was hurt. If he did not specify the track in his testimony, the omission is immaterial. The important fact is that the sand car was being taken to that track on which No. 29 was to have been made up.

The fact that the sand car had to be weighed before being placed on track 2 for No. 29 does not destroy the interstate character of the movement. The movement was to be a continuous one—taking the sand car out of track 10, pushing it up the cut-off track to the scales, weighing it, and then switching it over to track 2 to be made, along with other cars, some interstate, a part of No. 29. The movement had started when Cooper was injured. The weighing was merely to be one step in a series of movements designed to prepare and place the car for transportation on an interstate train.

The Supreme Court of Missouri held (R. 682) that, because the sand car had to be first weighed "and its load found reduced within permissible limits," its assignment to interstate transportation "was, at best, merely tentative or contingent." This conclusion disregards undisputed testimony and is in conflict with [illegible]able decisions of this Court and lower federal courts.

The mere fact that the sand car had to be weighed does not support any inference that it was overloaded or that its load would have been reduced had it been weighed. On the contrary, the evidence entirely negatives any such possibility. The car had been weighed the night before, found to be overloaded, and its contents reduced, presumably to its correct weight (R. 351, 355). It was found to be correctly loaded and shipped on No. 91 early the next morning (R. 478, 481). It would have gone out on No. 29 had not the accident occurred. The tank car did (R. 477, 480, 500). The sand car did not because it had to be inspected after the accident as a matter of routine (R. 478), not because it was overloaded. The only reasonable inference, and therefore, the undisputed fact, is that the car was correctly loaded.

Moreover, the interstate character of a movement is not destroyed by the possibility that something might have happened, but did not, to terminate the movement. See *Minneapolis & St. Louis R. R. Co.* v. *Winters*, 242 U. S. 353; *Grand Trunk Western Ry. Co.* v. *Boylen*,

7 Cir., 81 F. 2d 91; *Baltimore & O. R. Co.* v. *Darling*, 6 Cir., 3 F. 2d 987.

Thus there was nothing tentative or contingent at all about the sand car's assignment for transportation on No. 29. Its weighing was merely to be the first step designed to prepare it for transportation and Cooper's work in that connection was a part of that transportation. This Court has so held. In *Philadelphia & Reading Ry. Co.* v. *Hancock*, 253 U. S. 284, deceased was one of a crew switching a train of loaded coal cars from a mine to a switch yard two miles away. The ultimate destination of some of these cars was outside the state. Deceased's crew hauled the cars to the switch yard and placed them upon appropriate tracks where the duties of his crew with respect to them terminated. Deceased was injured in that movement. Later another crew, having gathered them into a train, moved them some 10 miles to a scale where they were inspected, weighed and *then* billed to specifically designated consignees in other states. The railroad contended that the coal in the cars ticketed for transportation to other states did not become a part of interstate commerce until the cars reached the scales and were there weighed and billed. This Court denied this contention, holding that, as a matter of law, Hancock was engaged in interstate transportation. It was said, l. c. 286:

> The coal was in the course of transportation to another State when the cars left the mine. There was no interruption of the movement; it always continued towards points as originally intended. The determining circumstance is that the shipment was but a step in the transportation of the coal to real and ultimate destinations in another State.

There the coal car was not even billed or assigned to interstate transportation when Hancock was hurt; that did not occur until *after* the car was weighed. That car *might* have been found to be overweight. Here the bill-

ing had occurred when the movement began and the sand car was, in fact, not overweight.

In Roberts, Federal Liability of Carriers, Vol. 2 (2d Ed.), Sec. 727, p. 1374, the text reads:

> But while the specific act in progress at the moment of injury may be devoid of character as to commerce, or may tend to show that the employee's work was intrastate in nature, yet, if such act is considered as one step in a series of acts it might clearly show the work to have been interstate in nature.

In *Wheeling Terminal Ry. Co.* v. *Russell,* 4 Cir., 209 Fed. 795, the railroad operated a switch track from Martins Ferry, Ohio, to Benwood, West Virginia, and delivered to a consignee there loaded cars originating outside that state. After the cars were unloaded, plaintiff's switch crew was sent to bring them back to Martins Ferry. To determine freight rates, the empty cars were weighed on a scale in Benwood. In the process of recoupling the cars after all had been weighed, plaintiff was injured. The Court held that plaintiff was engaged in interstate transportation because the cars had been employed in interstate commerce and no evidence of their withdrawal therefrom had been shown.

This Court has, in a series of decisions, evolved the principle that the performance by the employee of any necessary act, preparatory to actual interstate movement, which has as its object the aiding or furtherance of that movement, brings the employee under the Federal Act. *North Carolina R. R. Co.* v. *Zachary,* 232 U. S. 248; *New York Central & H. R. Co.* v. *Carr,* 238 U. S. 260; *Pennsylvania Co.* v. *Donat,* 239 U. S. 50; *Louisville & Nashville R. R. Co.* v. *Parker,* 242 U. S. 13; *Southern Ry. Co.* v. *Puckett,* 244 U. S. 571. These cases are alike on their facts in the respect that, in each, the duties being performed by the employee when hurt were preparatory to actual interstate movement and necessary to be done to aid and further that movement, and, therefore, directly and im-

mediately connected with and substantially a part or necessary incident of that movement.

In the Zachary case, deceased was a fireman on an engine standing in the Selma, North Carolina, switch yards. After inspecting, oiling, firing, and preparing the engine for a trip to Spencer, North Carolina, he attempted to walk across other tracks in the yard and was struck by a switch engine. He was awaiting the arrival of a train from Virginia so that two cars originating in Virginia could be placed in his train "to be carried forward as a part of a through movement of interstate commerce" (l. c. 259). This Court held that deceased was engaged in interstate transportation, saying, l. c. 260:

> It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still *in futuro*. It seems to us, however, that his acts in inspecting, oiling, firing, and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce, and the circumstance that the interstate freight cars had not as yet been coupled up is legally insignificant.

In the Carr case, plaintiff was a brakeman on an intrastate freight train, some of the cars of which carried interstate freight. On arriving at North Tonawanda, New York, two intrastate cars were uncoupled from the train and pulled by the engine down the track and back onto a siding, in which operation plaintiff was injured. This Court held that plaintiff was within the Federal Act because his job as brakeman required him to assist in switching these intrastate cars so that the interstate train might proceed, and that therefore his work was so directly and immediately connected with interstate business as substantially to form a part or necessary incident thereof.

The Donat case is similar. Donat began a switching movement designed to move two cars from without the

state from the switch yards to a private switch track. To complete the movement, it was necessary to uncouple the engine from these cars and with it, remove two empty ones from the private track. While so engaged, Donat was injured. This Court held that there was ample evidence that he was engaged in interstate transportation.

In the Parker case, deceased was a fireman of a switch engine engaged in transferring an empty intrastate car from one track to another. This Court held that if the purpose of the movement was to reach and move an interstate car (l. c. 14) "the purpose would control and the business would be interstate" because the act would be done for the purpose of furthering the later work.

In the Puckett case, plaintiff was hurt while raising a wrecked car to clear the tracks so that some of the remaining unwrecked cars could be hauled over them to be placed in an interstate train. This Court held that plaintiff was engaged in interstate transportation because his work was a preparatory movement to aid and further it.

The Circuit Courts of Appeals have applied the same principle in a variety of cases:

Sullivan v. *Wabash Ry. Co.*, 6 Cir., 23 F. 2d 323.
Youngstown & O. R. R. Co. v. *Halverstodt*, 6 Cir., 12 F. 2d 995.
Davis v. *Dowling*, 6 Cir., 284 Fed. 670.
Reap v. *Hines*, 2 Cir., 273 Fed. 88.

The principle of these cases applies here to stamp the act of weighing the sand car as an act necessary to prepare it for transportation on an interstate train, and therefore an act aiding and furthering the interstate movement of that train. The sand car had been billed and assigned for transportation on an interstate train. Before being actually placed on the train, it had to be weighed. The switching movement to weigh it and to place it on the track on which the train was made up

had actually begun. The act of weighing the car was, just as its switching, a necessary act to prepare it for transportation and the entire movement of the car was so directly and immediately connected with interstate transportation as substantially to form a part or necessary incident thereof.

The undisputed testimony in this case shows as a matter of law that Cooper was engaged in interstate commerce within the meaning of the Federal Act. His activities at the time of his injury consisted of moving a car, already billed and assigned for transportation on either of two interstate trains, to another track for the purpose of making it a part of one of those trains. From the time the switch engine hooked onto the car and started south on track 10, the movement and all phases of it, including the preparatory act of weighing the car, were interstate in character, and Cooper's duties with respect to the movement identified him as one engaged in work furthering, aiding and facilitating interstate transportation.

Moreover, the sand car ultimately left Topeka on No. 91 which, when it arrived at Topeka from Argentine, Kansas, carried three cars destined for St. Joseph, Missouri (R. 553-4), and when it left, carried three cars destined for points outside Kansas (R. 555-6). No. 91 was thus an interstate train. *North Carolina R. R. Co.* v. *Zachary,* 232 U. S. 248. Had not the accident happened, the sand car would have left Topeka on No. 29, indubitably an interstate train. A car not withdrawn from interstate transportation, but merely subjected to a delay in being carried to its destination, is still in interstate commerce. *Great Northern Ry. Co.* v. *Otos,* 239 U. S. 349.

II.

If the Federal Act Applies, Cooper Assumed the Risk of His Injury Because the Evidence Shows As a Matter of Law That: (A) The Risk of Injury from the Close Clearance Between Tracks 9 and 10 Was an Ordinary One Incidental to His Employment and Known and Assumed by Him; (B) If Extraordinary and Due to Petitioner's Negligence, the Risk Was Obvious and Cooper Knew and Appreciated the Danger from It and Therefore Assumed It.

Section 4 of the Federal Employers' Liability Act (April 22, 1908, Ch. 149, Sec. 4, 35 Stat. 66; 45 U. S. C., Sec. 54) provides:

> In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, * * * any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury * * * of such employee.

No such safety statute is involved here, and if the Act applies, petitioner is entitled to assert as a defense Cooper's assumption of the risk. *Great Northern Ry. Co.* v. *Leonidas*, 305 U. S. 1.

The rule has been uniformly stated by this Court to be that the employee assumes the ordinary risks of his employment and when obvious or fully known and appreciated by him, the extraordinary risks and those due to the negligence of his employer and fellow employees. The risks "fully known" to the employee include those so plainly obvious that he must be presumed to know them. *Delaware, L. & W. R. Co.* v. *Koske*, 279 U. S. 7; *Toledo, St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165.

Petitioner contends that the evidence shows as a matter of law, *first*, that the construction and maintenance of

tracks 9 and 10 in such close proximity to each other was not negligence, and, therefore, the risk of close clearance was an ordinary one incidental to Cooper's employment, which he knew and assumed; and, *second,* that even if the construction and maintenance of these tracks in such a manner were negligence, and therefore an extraordinary risk, Cooper fully knew (or is presumed to have known) of it and appreciated its danger. Whether the evidence has such probative force is to be determined by applicable principles of common law as interpreted and applied by the federal courts, and if it does, the trial court should have sustained petitioner's demurrer to all the evidence. *Chesapeake & O. Ry. Co.* v. *Kuhn,* 284 U. S. 44.

A. The close clearance between Tracks 9 and 10 was not negligence, because petitioner owed Cooper no duty with respect to the space between the tracks, and therefore, the risk of injury from such clearance was an ordinary one incidental to Cooper's employment as a switchman and known and assumed by him.

The distance between tracks 9 and 10 at the place of Cooper's injury, the narrowest place between the two tracks, was 7 feet, .05 inch. The clearance at this point between the car on which Cooper was riding on track 10 and the refrigerator car standing on track 9 was 1 foot, 7-3/4 inches (R. 85, 560).

This clearance had obtained in the Topeka yard since before 1922 (R. 282, 478). Cooper was an experienced switchman (R. 17, 57-9, 61-2) and had worked for petitioner in this yard in 1920, in 1929, and from 1930 to 1934, and from April, 1936, until November 25, 1936, the date of his injury (R. 17, 18, 59, 64, 116, 281). He worked in and over the whole yard and was familiar with the number and outlay of all the tracks, particularly those in that part of the yard south of Fourth Street (R. 64-5). He knew that track clearance was not uniform and knew of places where clearance was close (R. 66-7). He knew

that the space between tracks 9 and 10 was not uniform but varied as the tracks ran north (R. 25). He knew that he had to look out for ordinary hazards and that his job was not a "safe" one (R. 69, 117). He knew that track 9 had been shoved that night and knew that there were cars on it parallel to the sand car on which he was riding (R. 26, 74-8, 372).

This Court has often decided that the rule of law requiring an employer to exercise ordinary care in providing his employees a reasonably safe place in which to work does not impose upon a railroad the obligation to adopt or maintain any particular standard for the spacing or construction of its tracks and yards. The danger from a non-uniform spacing of tracks is a risk incidental to the employment and assumed by the employee.

Tuttle v. *Detroit, G. H. & M. Ry.*, 122 U. S. 189, first announced this principle. The negligence charged was that defendant had so negligently and unskillfully constructed its tracks with so sharp a curve therein that the drawheads of cars thereon failed to meet and pass each other, so that deceased, attempting to couple two cars thereon, was crushed to death. This Court held that this was not negligence, saying, l. c. 194:

> * * * we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved; much less that it should be left to the varying and uncertain opinion of juries to determine such an engineering question * * *. The interest of railroad companies themselves is so strongly in favor of easy curves as a means of facilitating the movement of their cars, that it may well be left to the discretion of their officers and engineers in what manner to construct them for the proper transaction of their business in yards, etc. It must be a very extraordinary case, indeed, in which their discretion in this matter should be interfered with in determining their obligations to

> their employees. The brakeman and others employed to work in such situations must decide for themselves whether they will encounter the hazards incidental thereto; and if they decide to do so, they must be content to assume the risks. * * * It is for those who enter into such employments to exercise all that care and caution which the perils of the business in each case demand. The perils in the present case, arising from the sharpness of the curve, were seen and known. * * * Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed. One of these dangers was that of the draw-bars slipping and passing each other when the cars were brought together. It was his duty to look out for this and avoid it. The danger existed only on the inside of the curve. This must have been known to him. It will be presumed that, as an experienced brakeman, he did know it; for it is one of those things which happen, in the course of his employment, under such conditions as existed here.

On page 196, this Court said:

> The defendant * * * had a right to construct its side-track with such curves as its engineers deemed expedient and proper; * * * Tuttle * * * entered into the employment of the defendant as a brakeman * * * with a full knowledge (actual or presumed) of * * * the form of the side-tracks, the construction of the cars, and the hazards incident to the service. * * * The only conclusion to be reached from these undoubted facts is that he assumed the risks of the business * * *.

This case was followed in *Toledo, St. L. & W. Ry. Co.* v. *Allen,* 276 U. S. 165, which is exactly in point. Plaintiff was a car checker whose duty it was to go from place to place in the yards while switching was being done, to check and list cars that had been switched and arranged on various tracks for the purpose of making up trains. At the time of his accident he was checking a string of cars on track 5. While so engaged, he was struck by two moving cars on track 4, kicked thereon by a

switch crew at work in the yards. The trial court authorized the jury to find negligence if the space between the tracks was found to be so narrow that when track 5 was occupied, plaintiff was in danger of being struck by cars moving on track 4. This Court held that that question should not have been submitted to the jury, saying, l. c. 169:

> The work of checking cars in a yard at night where switching is being done is necessarily attended by much danger. But fault or negligence may not be inferred from the mere existence of danger or from the fact that plaintiff was struck and injured by the moving car. Defendant did not owe to plaintiff as high a degree of care as that due from carriers to their passengers or others coming on their premises for the transaction of business. The reason for the distinction is that plaintiff's knowledge of the situation and the dangers existing because of the narrow space between the tracks was at least equal to that chargeable against the defendant. * * * The rule of law which holds the employer to ordinary care to provide his employees a reasonably safe place in which to work did not impose upon defendant an obligation to adopt or maintain any particular standard for the spacing or construction of its tracks and yards. *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521, 529. Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries. * * * Having regard to plaintiff's knowledge of the situation, it is clear that the evidence when taken most favorably to him is not sufficient to warrant a finding that defendant failed in any duty owed him in respect of the space between the tracks.

This case conclusively demonstrates that Cooper cannot recover and the Supreme Court of Missouri should have so held.

In *Randall* v. *Baltimore & Ohio R. R. Co.*, 109 U. S. 478, plaintiff, struck by an engine while engaged in throw-

ing a ground switch between two tracks, charged as negligence the improper construction and arrangement of the switch. This Court held there was no evidence of negligence, saying, l. c. 482:

> A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another, and any one who enters the service of a railroad corporation, in any work connected with the making up or moving of trains, assumes the risks of that condition of things.

The same doctrine has been applied by this Court to foreclose a jury's right to pass upon the location and maintenance of an open ditch used to drain a roundhouse and coal chute yard (*Delaware, L. & W. R. Co.* v. *Koske,* 279 U. S. 7) and the location of a mail crane 14 inches from the track (*Southern Pacific Co.* v. *Berkshire,* 254 U. S. 415 (followed in *Chesapeake & Ohio Ry. Co.* v. *Leitch,* 276 U. S. 429)). In the Koske Case, this Court said, l. c. 11:

> Defendant was not bound to maintain its yard in the best or safest condition; it had much freedom in the selection of methods to drain its yard and in the choice of facilities and places for the use of its employees. Courts will not prescribe standards in respect of such matters or leave engineering questions such as are involved in the construction and maintenance of railroad yards and the drainage systems therein to the uncertain and varying judgments of juries.

In the Berkshire case, Mr. Justice Holmes said, l. c. 417:

> The railroad is required and presumed to know its duty in the matter and it would seem that the Court ought to be equally well informed. It cannot be that the theory of the law requires it to be left to the uncertain judgment of a jury in every case.

Petitioner should not be compelled to have its engineering judgment with respect to the space between tracks 9 and 10 reviewed by a jury. Cooper's knowledge

of the danger was at least equal to petitioner's. It was not negligent in so constructing its tracks and Cooper knew and assumed the ordinary risk of danger from it.

B. Even if the construction and maintenance of Tracks 9 and 10 were negligence, and petitioner owed Cooper a duty to warn him of the presence of the cars on Track 9 and their close proximity to Track 10, Cooper knew, or must be presumed to have known, of the danger of injury therefrom and appreciated, and therefore assumed, the risk thereof.

Was the risk of close clearance obvious? The tracks had existed in that condition since 1922 (R. 282, 478). Cooper worked on and over these tracks and was familiar with their number and outlay in that part of the yards south of Fourth Street (R. 64-5). He knew the clearance between tracks 9 and 10 was not uniform (R. 25) and that track clearance generally in the yard was not uniform (R. 66-7). Other employees knew of the close proximity of tracks 9 and 10 at the point of Cooper's injury (R. 491). He shoved cars on track 9 every shift and had been on track 10 "numerous times" (R. 94-5). He knew cars had been spotted on track 9 that night and knew that cars were on it south of a point half way between Fourth Street and the junction of tracks 8 and 9 (R. 77). When he cut through the drag of cars on track 9 to board the sand car, he knew that cars were on track 9 south of him (R. 78, 81). He approached the sand car "from the direction of the engine" (R. 399). After he boarded the sand car, he saw Vandeventer 3 or 4 feet away, saw his lips moving, and engaged him in conversation (R. 33, 98, 121, 341, 371). He saw the figures "564" in white chalk on the sides of the sand car (R. 115, 123). The engine was only two car lengths south of him, its headlight on, facing north (R. 78, 95). He had a lantern on his left arm (R. 30). He rode in this position 300 to 350 feet south on track 10 (R. 32, 108). Vandeventer and Lawhun, who was riding on the top of the tank car

(R. 398), knew that cars were on track 9 at that place and, if they had looked, they could have seen them (R. 343, 383, 400).

To say that Cooper did not, under these circumstances, know that cars were on track 9 twenty inches east of him and that he was likely to be struck by the overhang of one of these cars is simply incredible. He must be presumed to know of the danger, in view of his knowledge of other facts, which, if considered at all at the time, would have conclusively warned him of the obvious danger at this point between tracks 9 and 10 to a man riding on the side of a car.

In *Toledo, St. L. & W. R. Co.* v. *Allen,* 276 U. S. 165, this Court said, l. c. 171:

> In any event plaintiff assumed the risk. He was familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him.

In *Delaware, L. & W. R. Co.* v. *Koske,* 279 U. S. 7, this Court said, l. c. 12:

> There was nothing obscure or of recent origin about the place where he was injured. The conditions were constant and of long standing. The evidence requires a finding that he had long known the location of the drain and its condition at the place in question. The dangers attending jumping from engines in the vicinity of the drain, especially in the dark, were obvious. Plaintiff must be held to have fully understood and appreciated the risk.

In *Southern Pacific Co.* v. *Berkshire,* 254 U. S. 415, this Court said, l. c. 418:

> But further, we must take it, * * * that Linder perfectly well knew of the existence of the crane where it stood, and could have seen it from his seat had he looked, long before he reached it. He entered the employment of the railroad when it had this ap-

pliance manifest in its place. The only element of danger that he may not have appreciated was the precise distance which the point of the crane would reach. But an experienced railroad man cannot be supposed to have been ignorant that such a projection threatened danger and, knowing so much, he assumed the risk that obviously would attend taking the chances of leaning well out from the train.

III.

If the Federal Act Applies, but the Evidence Does Not Establish Cooper's Assumption of the Risk As a Matter of Law, That Question and Cooper's Contributory Negligence Should Have Been Submitted to the Jury, Since There Is Substantial Evidence of Both Defenses.

If this Court should hold that the Federal Act applies, but also hold that the evidence does not show Cooper's assumption of risk as a matter of law, then that question and the question of contributory negligence should have been submitted to the jury. Petitioner requested, and the trial court refused, appropriate instructions submitting these defenses (R. 627-9).

There is substantial evidence tending to show that Cooper knew of the close proximity of track 9 to track 10; that he knew that cars were on track 9 at the place where he was injured; and that he knew, or ought to have known, that he was risking injury in attempting to pass through the intervening space. The jury should have been permitted to decide whether the condition of close clearance was patent and whether Cooper knew of it and appreciated its danger when cars were resting on track 10 at this point.

Texas & Pacific Ry. v. *Swearingen*, 196 U. S. 51, so holds. Plaintiff, a switchman, was riding the side of a box car and was knocked off by the overhang of a scale box located 19-1/2 inches from the ladder on which he was riding. He was familiar with the yards and knew of the location of the scale box and its proximity to the

track, although he testified that he did not know and never had his attention called to the distance between the track and the scale box, and had never seen a car on the track opposite the scales. This Court held, l. c. 62:

> The Court of Appeals was of opinion, and rightly we think, that the dangerous contiguity of the scale box to track No. 2, and the extra hazard to switchmen resulting therefrom, was not so open and obvious on other than a close inspection, as to justify taking from the jury the determination of the question whether there had been an assumption of the risk. The plaintiff was entitled to assume that the defendant company had used due care to provide a reasonably safe place for the doing by him of the work for which he had been employed, and as the fact that the defendant company might not have performed such duty in respect to the scale box in question was not so patent as to be readily observable, the court could not declare, in view of the testimony of the plaintiff as to his actual want of knowledge of the danger, that he had assumed the hazard incident to the actual situation.

Whether or not plaintiff had actual knowledge of the danger was a question for the jury, l. c. 63:

> As we have already decided that knowledge of the increased hazard resulting from the dangerous proximity of the scale box to the north rail of track No. 2 could not be imputed to the plaintiff simply because he was aware of the existence and general location of the scale box, it was for the jury to determine, from a consideration of all the facts and circumstances in evidence, whether plaintiff had actual knowledge of the danger.

There is also substantial evidence tending to show that Cooper failed to exercise ordinary care for his own safety. Knowing of instances of insufficient clearance in the yards, knowing that the space between tracks 9 and 10 was not uniform, and knowing that cars were spotted on track 9 south of the point where he boarded

the sand car, he nevertheless deliberately chose to place himself on the east side of the car next to track 9, and there ride 300 to 350 feet, looking at and talking to Vandeventer, rather than looking out for his own safety. He had a lantern and the engine headlight faced him. In his application for employment (R. 72), he said that he understood that there were dangerous clearances in the yards and he would inform himself of them. By merely stepping on the back end of the car, he could have avoided all danger of being struck by a car on track 9 (R. 148, 291). Where an employee chooses the dangerous, rather than the safe, way of performing an act, he is contributorily negligent. *Gilbert* v. *Burlington, C. R. & N. Ry.*, 8 Cir., 128 Fed. 529, 534; *Johns-Manville, Inc.*, v. *Pocker*, 8 Cir., 26 F. 2d 204, 207.

Thus, if the Federal Act applies in this case, there is substantial evidence requiring the submission to the jury of the questions of Cooper's assumption of risk and contributory negligence.

Conclusion.

We respectfully submit that the federal question involved in this case is so substantial as to call for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Supreme Court of Missouri.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 1025.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PETITIONER,

VS.

MELVERN A. COOPER, RESPONDENT.

SUGGESTIONS AND BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CLARENCE C. CHILCOTT,
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I.

Foreword.

While counsel for respondent believes that the petition for a writ of certiorari fails to show a *prima facie* case for its issuance and that a motion to dismiss would be proper, nevertheless, respondent will not press the point but will endeavor to show the court the absence of substance in petitioner's contention.

In this connection respondent will confine his attention to Point I only of petitioner's summary and argument, to-wit, to the question of whether or not the respondent, at the time of his injury, "was employed in interstate transportation or work so closely related thereto as to be a part thereof."

As the questions of negligence or no negligence, contributory negligence and assumed risk only become relevant in case this court conceives respondent to have been within the provisions of the Federal Employers' Liability Act, the discussion of them here is, therefore, superfluous.

II.

Inaccuracies and Omissions in Petitioner's Statement of the Facts.

Petitioner states (p. 9) that cars ATSF 99923, a tank car, and AT 173233, a Caswell coal car, were to be transported, the night respondent was injured, on trains Nos. 29 or 91, and that they had been billed and assigned for transportation on one of said two trains, referring to numerous record page citations as a basis for this statement, none of which bear out petitioner's contention, the only bit of evidence even approaching said contention being the testimony of H. H. Robinson (R. 261). He stated that after the switch foreman went to work he was ordinarily handed a sheaf of lists called yard checks, upon which were the numbers, initials and destinations of cars that were billed and ready to move, and that one of his lists was designated the "29 check," which showed the cars that were billed and *must* move on train 29, but by reference to page 1, defendant's Ex. "B" (R. 354), which shows the cars listed for movement on train 29, we fail to find either of these cars thereon. Further, Mr. Robinson testified (R. 263) that the cars listed upon the "west short" check were to move on train 91, "has to go on 91" (R. 265), yet by reference to the cars listed on said "west short" check, being page 2 of defendant's Ex. "B" (R. 354), we see that neither of these cars are listed thereon for movement on train 91. Mr. Robinson

further testified (R. 264) that the cars listed on page 3 of defendant's Ex. "B" (R. 354), known as the "west check," were cars to be handled west *in any train permitting by tonnage or number of cars,* and page 3 of defendant's Ex. "B," being said "west check," listed cars AT 99923 and AT 173233.

The positive and undisputed evidence was that when a car had to be weighed the billing was not completed until after it had been weighed (R. 114).

A reference to a portion of the testimony of witness Robinson, set out at pages 9 to 11, inclusive, of the petition for a writ of certiorari, contains nothing indicating in what train either of these cars were to be moved, and the documentary evidence introduced by the petitioner, coupled with the testimony of petitioner's witnesses, conclusively demonstrates that the movement of these two cars in any train was left open whether they were billed or not.

Further, petitioner's witness, Leon L. Logan, night yard master and in charge of the yards and switching movements on the night respondent was injured (R. 472), testified that none of the cars listed on page 3 of defendant's Ex. "B" (R. 354) were to go out on train 29 except the car of water, for which train 29 was the proper connection, and any "perishables" (R. 485, 486); that when he used the expression "have to go" he was speaking of perishable goods.

On page 13 of its petition petitioner states without a record page citation that the purpose of the intended movement was to make the car of sand a part of train No. 29; that after being weighed it was to be switched back on the cut-off track and over to another track to be

made a part of train No. 29; that customarily No. 29 was made up on track 2; that all cars to be transported on No. 29, intrastate or interstate, were switched and placed on track No. 2. All of these statements are without record page citations for the reason that there is no evidence whatsoever to support them. In fact, the evidence of petitioner's own witness, the switch foreman, John R. Vandeventer, in answer to a leading question by defendant's counsel, stated that there was no customary track upon which to make up train No. 29 and that there was no customary track upon which to place the cars out of Topeka that went into train No. 29 (R. 381-382).

Petitioner makes the further statement on page 13, that when the city drag was ready they were to be switched onto track 2 and made a part of No. 29, and, in fact, were so put into 29 and left Topeka that night. The record page citations do not bear out this statement. The witness in testifying stated what could be done, what sometimes was done, and what generally was done. There is not a scintilla of evidence in this record that on the night in question train 29, or the drag that came down from the freight station, or any of the cars that went out on train 29, were placed on track No. 2, or any other particular track, or that the train was made up or switched in any particular manner or at any particular place. This is the view arrived at by the Missouri Supreme Court (R. 681) which said:

> "The defendant in its brief says, 'Because the crew had nothing pressing immediately after supper, Vandeventer decided to move the sand car to track 2, to send it out on No. 29, and so told plaintiff.' The seven references to the abstract in support of the foregoing statement have been examined. They particularly fail to support that portion with refer-

ence to moving the sand (coal) car '*to track 2,*' or, for that matter, to any specific track, although one of such references does say that 'as a rule' track 2 was used for the purpose of making up train No. 29."

It is not claimed that respondent produced any evidence indicating that he was engaged in interstate transportation and the records of petitioner and testimony of its witnesses, even if such testimony could be tortured into evidence indicating that respondent was engaged in interstate transportation, would still leave only a question for the jury as to that fact.

III.

As to the questions presented and the reasons relied upon for the allowance of the writ.

As stated, *supra,* respondent is not going to consume the time of the court in discussing questions of negligence or no negligence, contributory neglience or assumed risk, as such questions are moot at this time so far as this proceeding is concerned.

Paragraph 2 of Rule 38 of this court provides that the petition contain, among other things, a statement of the questions presented, and Sec. (a) of Paragraph 5 of said rule provides that while neither controlling or fully measuring the court's discretion the court will issue the writ where it appears that the state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accordance with applicable decisions of this court, and respondent respectfully submits that petitioner's statement on page 7 of its petition does not present any question to this court for review. Certainly it does not present the question of interstate transportation or no interstate transportation but boldly anticipates that this

court will hold respondent was engaged in interstate transportation as a matter of law and so states the fact to be, thereby merely presenting to the court the questions of the applicability of its defenses, which are of secondary importance, as shown above, and petitioner does not present the only question really involved which is whether or not respondent at the time of his injuries was engaged in interstate transportation or in work so closely connected therewith as to be a part thereof. The petition is, therefore, insufficient for not presenting the real question involved.

Petitioner states the reasons relied upon for the allowance of the writ are that the Supreme Court of Missouri held that at the time of his injury respondent was not employed in interstate transportation and in so holding decided an important question of federal law in conflict with applicable decisions of this court and of the federal Circuit Court of Appeals and has failed to give proper effect to the undisputed testimony in the case establishing the interstate character of respondent's work.

Respondent submits that both of these statements are inaccurate, that both of these questions have been decided by this court, both directly, and indirectly, by the refusal to grant its writ of certiorari in many cases.

The decision of the Supreme Court of Missouri in this case follows the law as laid down by this court either in direct proceedings or by denying writ of certiorari, and the decision in this case, being in harmony with such pronouncements there is no reason shown for the issuance of the writ.

SUMMARY OF ARGUMENT.

A.

The burden of proof was upon petitioner to establish that respondent was employed in interstate transportation, or work so closely connected therewith as to be a part thereof, at the time of his injury. This burden petitioner particularly failed to sustain as there was not a scintilla of evidence whatsoever that respondent was employed in such transportation. At the time of respondent's injury he was assisting in moving one intrastate car in order to get to another intrastate car and take it to the scales for weighing to ascertain whether or not its contents had been reduced to the proper load limit.

B.

It is not claimed that respondent produced any evidence that he was engaged in such interstate transportation, nor do the documents introduced by petitioner of themselves establish such fact. Respondent submits that the documents introduced by petitioner, plus the testimony of petitioner's witnesses, wholly failed to show such fact, but even if there was sufficient testimony of defendant's witnesses to piece out the evidence shown by the documents, nevertheless, the credibility of such witnesses and the weight and the value to be given their testimony were purely jury questions and petitioner by refusing to submit to the jury the question of respondent's employment in interstate transportation at the time of his injury and by electing to stand upon the proposition that respondent was so employed, cannot now be heard to complain that respondent was employed in interstate transportation as a matter of fact when not so employed as a matter of law.

ARGUMENT.

A.

Respondent was not engaged in interstate transportation as a matter of law.

It is respectfully submitted that the testimony of petitioner's witnesses not only did not establish respondent's employment in interstate transportation but that such testimony conclusively established that he was not so engaged and following respondent is quoting excerpts from such testimony which speak for themselves:

"By John R. Vandeventer, switch foreman:

Direct Examination.

"Q. And—do you remember just what you—what you did just before you went to supper that night, Mr. Vandeventer?

A. Well, we shoved—shoved No. 9.

Q. Shoved track No. 9?

A. Yes, shoved over Fourth Street and then we went to supper (R. 332).

• • •

Q. After you shoved track 9 you didn't do anything else until you went to lunch, did you?

A. That is right (R. 358).

Q. Then the first thing you did after you come out from lunch was go down to track 10 and pull those cars in on track 10?

A. Yes, sir (R. 359).

• • •

Q. Were they on the same switch list as the cars on track 9?

A. Track 9—cars on track 9 wasn't on no switch list (R. 377).

• • •

Q. Then you got through eating and then what did you do?

A. Well, we come out and I told the boys we would go up in No. 10 and *if we had time* we would get a car of sand that was in there and weigh it and put it on train 29 (R. 336).

* * *

Q. And was the tank car in between the engine and the coal car—the sand car?

A. Yes.

Q. The coal car was full of sand that night?

A. Yes (R. 338).

* * *

Q. How about track 10, is that a live track?

A. Yes.

Q. Use that right along in switching, too?

A. Well, use that to—for instance, like that car of sand, that car of sand had come out sometime previous before that night and had been weighed, that is, I suppose it had been weighed, and it was too heavy, and they put it in that track for them to come and reduce it. You see, that track is situated (R. 351) so that they can get down there with a truck, you see, and back up to it and reduce it.

* * *

Cross Examination.

Q. Well, where did you get your information that it had been put in there some time before, and that they had unloaded part of it?

A. Well, it was on the checks (R. 352).

* * *

Q. (by Mr. Chilcott) Yes.

A. It is marked "sand," you see, and is designated as 564. That goes west, and with a weigh sign after it.

Q. A weigh sign?

A. Yes, that indicates that that car of sand has to be weighed.

Q. Yes, but don't you weigh them when they first come out?

A. Absolutely.
Q. What I want to know, Mr. Vandeventer, is how you know that is the second time it had been weighed?
A. Well, it hadn't been weighed yet.
Q. Well, I thought you said it was too heavy and they unloaded part of it?
A. Yes, and they unloaded part of it, yes.
Q. Well, I thought you said they had to unload part of it?
A. That is right.
Q. Well, how can you tell that by looking at this switch list unless you got some other information?
A. Well, as a rule that car of sand wouldn't have been in unless it was too heavy.
Q. Well, it is now because of your experience you are telling the jury that; in other words, you had seen that happen before, is that right?
A. Yes, and when I got that check I seen that was okay, to be—to go out, but it had to be weighed first (R. 355).
Q. Now, it had to be weighed in order that you might have the proper billing for the freight charges?
A. No, whether it is too heavy or not (R. 356).
* * *
Q. Now, did you have anything else to do until they pulled that city drag down, except to switch, except to weigh this car?
A. Well—
Q. That you remember of?
A. Not that I remember of, no (R. 358).
* * *
Q. What you were going to do was to kick that car of sand up on the cut-off and kick the tank car back in on No. 10 and then go up and weigh that car of sand?
A. That was my intention.
Q. That was your intention; and then you would come back down and dispose of the car of sand and tank car?

A. Dispose of the car of sand, I didn't have ahold of the tank car then.
Q. Yes, but you could get hold of it, or weren't you intending to switch it at that time?
A. No, I can't recall that I was (R. 359).
* * *
Q. Now, then, at the time when you shoved those cars up on track 9, did you know they were going to have to pull those cars out of track No. 10?
A. Well, no, I didn't.
Q. That was your next move, though, wasn't it?
A. Well, it was *if I had time.*
Q. If you had time?
A. If I had time.
Q. *And if you hadn't had time you would have just let that gone?*
A. Yes, that is right.
Q. But when you got out from lunch there wasn't anything else there that required your immediate attention so you went down and got hold of this coal car to take it up and weigh it?
A. That is right (R. 377).

Re-Direct Examination.

* * *
Q. And in making up 29 you go around and gather up the cars on this switch list for 29, or on the third page here, west?
A. Yes.
* * *
Q. And then you take the bunch that you have made up there on track 2 and put them in train 29?
A. Well, we have done that.
Q. Well, isn't that the customary way to do that?
A. Well, the custom is—no, not always (R. 381). we have done it; we have done it; and we—oh, we have made 29 up in different ways, but then as a customary rule 29 will have so many cars going through with it, and he comes in with it and we have

his cars going out on another track, and we generally, as a rule, take the cars that is coming in, that he brings in, that is going through with him, and put them on what we have going out.

Q. Oh, I see.

A. And we make him up on a different track, he leaves town on a different track than he comes in on (R. 382).' "

By H. H. Robinson, general yardmaster:

Direct Examination.

" 'A. The foreman is completely in charge of the whole crew, the engine crew and the two helpers.

• • •

Q. Now, who gives him his instructions when he goes to work?

A. The yardmaster.

• • •

Q. And just tell us in what form those instructions take, how does he know what to do with his crew when he goes to work?

A. When he goes to work, or sometime after he goes to work, providing the lists are not out, he will be handed a sheaf of lists that we call the yard checks, and on those yard checks are numbers, initials, destinations of cars that are billed and ready to move. One of his lists is what we call the 29 check. That shows the cars that are billed and *must* move on 29.

• • •

Yes, unless they are bad ordered or some other, something else happens that they (R. 261) can't move, and the rest of the lists are east checks and west checks (R. 262).

Q. (By Mr. Monteith) I hand you defendant's Exhibit B here consisting of seven pages and ask you if you can tell us generally what that exhibit is?

A. *These are the yard checks, the top one is 29's check.*

Q. All right. Now, what is the second page on that?
A. The second page is the west short check.
Q. Now, just explain to us what that means, 'west short check'?
A. West short check means *cars that are billed to stations between Topeka and Emporia,* any stations between Topeka and Emporia. They are to move on 91, which is a local train.
Q. Now, just a minute; the papers you have in your hand, defendant's Exhibit B, they—I will ask you whether or not that is what is given by the yardmaster or the night yardmaster, as the case may be, to the switch foreman designating his work for his shift?
A. It is.
Q. All right. Now, take the third page and tell us what that is?
* * *
A. The third page is what we call a straight west page (R. 263).
* * *
Q. That is what they call the west check, and what is to be done with cars appearing on that third page, west check?
A. *They are to be handled west in any train that will permit, by tonnage or number of cars.*
Q. I didn't get that?
A. I say, they will be handled in a later train than 29, unless the tonnage limit of 29 or the car limit of 29 will allow us to place them in 29. If it will, why we fill 29 with cars from the west check and then run the rest of them on 91 in the morning (R. 264).

Cross Examination.

Q. All right. Now, Mr. Robinson, this coal car, AT-173233, that was the car of sand, wasn't it?
A. Yes, I believe it was. According to the list, yes, sir.

* * *

Q. Now, that car of sand originated there at Topeka, didn't it?

A. Yes, sir.

Q. And was booked to Emporia?

A. Yes, I presume it was, I don't know.

Q. Doesn't it say there, 564?

A. It is listed 564.

Q. Well, that means Emporia?

A. That means Emporia.

Q. Topeka and Emporia are both in the same state?

A. Yes, sir.

Q. Now, this car of water originated there at Topeka?

A. Yes, sir.

Q. And that is destined to station 523, Quenemo?

A. Quenemo.

Q. And that is in the State of Kansas?

A. Yes (R. 300).

Q. And you don't have to go out of the State of Kansas to go from Topeka to those two cities, do you?

A. No, sir (R. 301).

* * *

Q. Mr. Robinson, I notice here this—in connection on page 3 here of this thing, a AT-173233, is a cross hatch mark opposite that number; what does that mean?

A. It means 'to weigh.'

Q. It means you have to weigh that car before you put it in the train?

A. Yes, sir (R. 303).

Q. Now, you say train 91 originated in the Argentine yards; where does it go to?

A. Goes to Emporia (R. 304).' "

By Leon L. Logan, night yardmaster:

Direct Examination.

"'Q. 99923. Now, I hand you here some papers that have been identified as defendant's Exhibit B and ask you to—that is the switch list that Mr. Vandeventer was working with that night, was it? Is it?

A. Yes, sir (R. 476).

* * *

Q. Well, just take the tank car and the car of sand?

A. The car of sand, left it right in the track, right where the accident was, same track.

Q. I mean, after the accident, you don't know what they did with it, or did you leave it there?

A. No, no, it went out of town—no, the car of sand stayed right there and the car of, the tank car was a car of water for Quenemo, Kansas, went out on 29, train 29 (R. 477).

Cross Examination.

* * *

Q. All right. Now, look here on page 3. Tell us what cars *have to go on 29?*

A. What cars have to go on 29?

Q. Yes.

A. Not any of them.

Q. Not any of them?

A. Not any of them had to go.

Q. But that water car there was on that list, isn't it on page 3, isn't it?

A. That is the proper—pardon me—(R. 485).

Q. How is that?

A. That is the proper connection for that car of water, but it is not perishable. When I say 'have to go,' I am speaking of perishable goods.

Q. Well, you are not telling the jury then that that car of water then had to go on train 29, are you?

Mr. Monteith. He just said it didn't.

The Witness: I said it didn't.

Q. (by Mr. Chilcott) It didn't?
A. It is not perishable (R. 486).
* * *
Q. After this accident occurred, were any more cars placed on—or lined up for movement out on 29, that you know of?
A. After this accident?
Q. Yes?
A. Yes, sir.
Q. How many and what for?
A. The reason I say yes, sir, is because *the merchandise had not been handled yet from the freight house.*
Q. I see. In other words, at the time of the accident that hadn't been shoved down on the cut-off yet, had it?
A. The merchandise had not been shoved down on the cut-off yet.
Q. Yes, that is right.
A. That is right.
Q. Now, that merchandise from the house track is picked up by the engine that works in the north yards and shoved down on the south yards, and this engine that works the south yards gets it and distributes it, is that right?
A. Yes, sir.
* * *
Q. It wasn't down there?
A. It wasn't down there.
Q. At the time of this accident?
A. Not down there at the time of the accident, no, sir.
Q. And No. 29 wasn't in at the time of the accident?
A. No, sir (R. 490).' "

The two cars involved in this case were coal car AT-173233 and tank car AT-99923.

Defendant's (Petitioner's) Exhibits "G" and "F" (R. 502) (switch list) constitute a record of the cars

hauled in train 29 out of St. Joseph and into Topeka (R. 497) and out of Topeka and into Emporia (R. 498, 499), respectively.

Deft. Exhibit "M" (R. 554) (switch list) is a record of the cars hauled in train 91 out of Argentine and into Topeka (R. 552, 553), and respondent's Exhibit 18 (R. 558) (switch list) is a record of the cars hauled on train 91 out of Topeka and into Emporia (R. 555).

All the cars listed on page 1 of the yard check, Deft. Ex. "B" (R. 354), for movement on 29 out of Topeka except five were placed in No. 29 at Topeka (Deft. Ex. "B," R. 354; Deft. Ex. "F," R. 502) and the five not placed therein at Topeka were marked "hold for 29—11-26-36" so that all the cars on page 1 of said exhibit were disposed of although they all did not go out on No. 29. Some of the cars that were on the house track to be shoved down the cut-off were for No. 29 (R. 490).

Not a car listed on page 2 of the yard check (Deft. Ex. "B," R. 354), which yardmaster Robinson testified had to go on train 91 (R. 263-4-5), was moved on train 91 out of Topeka on November 25th (Pltf. Ex. 18, R. 488, 555-6-7-8).

Only 10 cars listed on page 3 of the yard check designated as "west" (Deft. Ex. "B," R. 354) were incorporated in train 91 at Topeka (Pltf. Ex. 18, R. 488, 558) and one of the cars listed on this yard check, AT-99923, was incorporated and moved in train 29 (Deft. Ex. "F," R. 502) which left 12 cars on the "west" check of this exhibit undisposed of. None of the cars on page 3 of Deft. Ex. "B" (R. 354) had to go on No. 29. This train was the proper connection for the car of water but it did not have to go therein (R. 485, 486).

The above analysis of these yard checks and switch lists will be more readily apparent by a comparison of the contents of trains 29 and 91 out of Topeka with the yard check designating the cars to be moved on those trains.

A switch list is used in breaking up a train and a yard check in making up a train (R. 353, 476), but sometimes the various witnesses used them interchangeably (R. 331, 353). The yard check indicates what ought to be done, the switch list what has been done (R. 495). Cars AT-99923 and AT-173233 appear on page 3 of defendant's car check, Exhibit "B" (R. 349, 354). Car AT-99923 also appears on page 1 of the switch list, Exhibit "F" (R. 502), and car AT-173233 also appears on switch list (Pltf. Exhibit 18, R. 558). These cars originated at Topeka and were destined station Nos. 523 (Quenemo, Kansas) and 564 (Emporia, Kansas), respectively (R. 268, 271, 272, 300, 354), and would not leave the State of Kansas in making the trip (R. 300, 301).

Coal car, AT-173233, was loaded with sand originating at Topeka, Kansas, and destined Emporia, Kansas (R. 115, 271, 300, Deft. Ex. "B," R. 354, 355; Pltf. Ex. 18, R. 554-558). It had been in the yards before but found to be overweight and was set back on track No. 10 about 500 feet north of the lead track (R. 29, 351, 352), where the tracks were far apart (R. 370), so that some of the sand could be unloaded into trucks and the weight reduced to the capacity of the car (Deft. Ex. "B," R. 351-2-3-4-5-6). A cross hatch (#) opposite the car number on the yard check (switch list) indicated that car AT-173233 had to be weighed before being put in a train (R. 303, 355; Deft. Ex. "F," R. 502). It would not have been on track No.

10 if it had not originally been too heavy (R. 355), and when Vandeventer got his yard check he saw that the car was listed to go out, but it had to be weighed first (R. 338, 341, 352, 353, 355, 357, 358). Car AT-99923 was a car of water for drinking purposes (R. 268). Vandeventer went off duty at 12:00 (R. 344-348), finished his work for the night, and doesn't know what happened to either of the cars (R. 350). He worked from the yard check (switch list) (R. 350). The billing of the car is completed after it is weighed, and there was no card on AT-173233 (R. 114).

After the train crew shoved track No. 9 they had no other switching to do that night except the city "drag" when it came down (Deft. Ex. "B," R. 354) and train 29 when it arrived (R. 356, 358). At the time Vandeventer shoved track No. 9 *he did not know he was going to move the car of sand, AT-173233,* but that turned out to be his next move (R. 377) *if he had time* (R. 336, 341) before the merchandise cars from the city were shoved (R. 357) down or No. 29 got in (R. 358). If he did not have time, he "*would have just let that gone.*" But when he finished lunch there was nothing demanding his immediate attention so he went down to get the car of sand and weigh it (R. 336, 358, 377). He had nothing to do except weigh the car of sand (R. 358) and that was the first thing he did after lunch (R. 359). The merchandise from the freight house had not been handled, nor was No. 29 in at that time (R. 490). They had no intention at that time of switching the tank car, AT-99923 (R. 359), which was coupled to the south end of the coal car and loaded with water originating at Topeka and destined Quenemo, Kansas (R. 271, 272, 338, 476). There was no evidence of any particular work done or movement made before shoving track No. 9 (R. 374).

After lunch while respondent was setting brakes the engine went to the south end of the yard and came north up track No. 10 (R. 28) and coupled onto the tank car No. AT-99923, which was coupled onto car No. AT-173233, the Caswell coal car, and which was the first movement after lunch (R. 359), whereupon respondent boarded the northeast corner of the Caswell coal car (R. 340) AT-173233 (R. 29), a fair representation of which is (Pltf. Ex. 4, R. 44, 295).

Respondent was standing on the sill step holding to the grab irons (R. 30, 339, 340, 366) on the northeast corner of the coal car and about 6 feet from and facing Vandeventer (R. 340) with his back toward track No. 9 (R. 371, 372), which was a normal and usual place for him to be (R. 29, 30, 366, 370, 371). He had some conversation with Vandeventer in regard to weighing the car of sand and was told they would weigh it if they had time and take it to the south end (R. 98, 100, 341, 377). Vandeventer then started to get down off the brake platform when an unusual noise attracted his attention and looking around he saw respondent falling behind the car and hit the ground (R. 341, 373), whereupon he gave a stop signal (R. 341). Vandeventer made a statement (Deft. Ex. "E," R. 346) in which he stated that the cars involved in respondent's injury were AT-173233 and NADX-8078 (R. 367, 368, 372, 373). He was handed the exhibit for the purpose of refreshing his recollection and it is significant that on said exhibit Vandeventer made this notation:

> "Cooper was riding on the step on the rear end of car No. AT-173233 and was knocked off of this car by NADX-8078 which was in No. 9 track. We were backing out of track No. 10" (R. 347).

This statement was made at the yard office that night (R. 344) and was mostly in Vandeventer's handwriting (R. 345).

Petitioner's witnesses testified switch track No. 10 was not assigned for any particular purpose in the yards although the other tracks were assigned for particular purposes (R. 301, 368, 492, 493, 494). It was not frequently used (R. 24). C. O. track extended from the south end of the yard to the scale track (R. 24).

The movements necessary to weigh AT-173233 after the crew had finished their lunch were as follows: Go to the south end of the yards and come up the cut-off to track 10, throw the switch at track 10, enter track 10 and couple onto AT-99923, back out of track 10 onto the cut-off, throw the switch, kick AT-173233 up the cut-off past its connection with track No. 10, line the switch for track No. 10, kick AT-99923 in on track No. 10, line the switch to continue up the cut-off, couple onto AT-173233, take it to the scale track, throw switch, move car onto scale, uncouple from it, weigh it, couple onto it, haul it back down the cut-off and dispose of it (R. 110, 359). After plaintiff's injury the car of sand remained at the place of the injury until later in the evening. The tank car No. 99923 went out on No. 29 (R. 477).

The presumption is that both petitioner and respondent while operating within the State of Kansas were engaged in intrastate transportation, *Osborne* v. *Gray,* 241 U. S. 16, 36 S. Ct. 486, 60 L. Ed. 865, and the burden of proof was, therefore, upon petitioner to establish re-

spondent's employment in interstate commerce. Also, where the proven facts give equal support to each of two inconsistent inferences, judgment as a matter of law must go against the party having the burden of proof, *Penn. R. Co.* v. *Chamberlain,* 288 U. S. 333, 53 S. Ct. 391, 77 L. ed. 819, and the character of respondent's employment at times other than the time of his injury is wholly immaterial, *C. & N. W.* v. *Bolle,* 284 U. S. 74, 53 S. Ct. 59, 76 L. ed. 173. Also, this court will presume that the Supreme Court of the State of Missouri construed the law so as to uphold it, *Douglas* v. *N. Y. N. H. & H. R.,* 279 U. S. 377, 49 S. Ct. 355, 73 L. ed. 747.

From the above and foregoing it is clear that all the cars put in train 29 were in the city drag as Vandeventer testified on page 358; that the only switching he had to do was the city drag and train 29 *when it got in.* The cars on track 9, which he shoved the last thing before he went to lunch, were not on a switch list, there is no evidence as to their character *and at the time he shoved track 9 he did not know that he would have to pull the cars of sand and water out of track 10* (R. 377), which is indicative that he did not have his yard check at that time, and this conclusion is strengthened by his testimony that it was his habit to look the yard check over during lunch (R. 381). Weighing the car of sand was his next move *if he had time, but if he didn't have time he would not have done it.* However, there being nothing which required his attention immediately after lunch, he went down to take the car of sand up and weigh it. That the switch list (yard check) defendant's Ex. "B"

(R. 354), listed all the cars to go out (R. 336), which cars he had not begun to switch at the time he went to supper (R. 356), coupled with the fact that he did not have anything to do except switch the city drag and No. 29 when it came in (R. 358), and the fact that all the cars that were put on trains 29 and 91 at Topeka were on the yard check, defendant's Exhibit "B" (R. 354), is conclusive that not a car at Topeka for trains Nos. 29 and 91 had been switched or could be switched until the city drag got down from the freight house (R. 358, 490), and until after respondent was injured. There was, therefore, no train containing interstate cars being made up at that time and the record is barren of any evidence of a single interstate, or any car, being switched or a single movement being made toward making up any train prior to respondent's injury.

Any cars which might be moved in the yard would not be impressed with an interstate character until they became identified with an interstate movement, and as there was no evidence that the movement which was in progress when respondent was injured was designed to or did in any respect aid or further the interstate transportation in which petitioner was engaged, there was a total failure of proof that respondent at the time of his injury was employed in interstate transportation within the meaning of the statute, *Illinois Central Railroad Co.* v. *Behrens,* 233 U. S. 473, 34 S. Ct. 646, 58 L. ed. 1051; Annotated Cases 1914C, 163; *Erie Railroad Co.* v. *Welch,* 242 U. S. 303, 37 S. Ct. 116, 61 L. ed. 319; *Minneapolis & St. Louis R. Co.* v. *Winters,* 242 U. S. 353, 37 S. Ct. 170, 61 L. ed. 538; Annotated Cases 1918B, 54.

Train 91 originated at Argentine, Kansas City, Kansas (R. 98, 304, 489), and operated locally between that point and Emporia, Kansas (R. 356), via Topeka (R. 263, 300, 304, 356).

Train 91 hauled four interstate cars into Emporia, being car GN-30481 for Station 3964, Pueblo, AT-37990 for Station 1340, Albuquerque, New Mexico, AT-235650 for Station 8318, Cleburne, Texas, C&NW-47646 for Station 3454, Superior, Nebraska (plaintiff's Ex. 18, R. 558), (defendant's Ex. "C," R. 269).

The first three of the above cars will all be found on page 3 of respondent's yard check (defendant's Ex. "B," R. 354), and car C&NW-47646 was picked up after the train left Topeka (R. 556). None of the three cars had been switched at the time respondent was injured as they were included in the drag of merchandise which had not been shoved down the cut-off (R. 490). Vandeventer had not begun switching to make up train 29 (R. 356) and as he had no other switching to do until they pulled the city drag down, it is apparent that the petitioner had not begun to make up any train or to assemble any interstate cars which were going to be put in train 29 or 91. There is not a scintilla of evidence in the record that a single car had been switched on any track for the purpose of being placed in either train 29 or train 91. Furthermore, if any cars were to be placed in train 91 they would be switched by the crew following Vandeventer's crew, which went off duty at midnight (R. 344, 348), and Vandeventer would only use that yard

check (defendant's Ex. B, R. 354), so far as it showed his work in making up of trains for his particular trick (R. 266). Train 91 in which car AT-173233 left Topeka was not due to leave Topeka until after 2:00 o'clock the next morning (R. 489) and it is not claimed that Vandeventer's crew was to switch or attempt to switch all the cars on the switch list (defendant's Ex. "B," R. 354); in fact, from the testimony of night yardmaster Logan (R. 479) after the cars were classified for No. 91, and that train comes in, the cars designated for movement out of Topeka in it are made up by the switch crew which is on duty at that time (R. 479).

Train 91 had three interstate cars into Topeka, being AT-7900, AT-37671 and AT-66414, for Station 2473, St. Joseph, Missouri. These cars were all dropped at Topeka as they were going north from Topeka, R. 262, page 7 (defendant's Ex. "B," R. 354). They do not appear on the switch list of No. 91 out of Topeka (plaintiff's Ex. 18, R. 558), and the three cars having been dropped from train 91 at Topeka, such train was no longer interstate in character, *Rissell* v. *St. L. S. F. R. Co.*, 336 Mo. 845, 81 S. W. (2d) 621, until other interstate cars were incorporated therein and the character of train 91 before arriving at Topeka is immaterial. It is only the character of the train at and after it left Topeka that is material. Furthermore, respondent was injured at approximately 8:45 P. M. (R. 29), more than an hour before train 91 left Argentine (R. 489), and there is no evidence as to when 91 was made up at Argentine, or what cars were designated to move in it or when they were so designated, and as they had not begun to switch the cars which were leaving Topeka in 91 at the time respondent was injured and at the time train 91 left

Argentine there is nothing upon which to predicate the employment of respondent in interstate transportation at the time of his injury, so far as train 91 is concerned.

All through the testimony, by leading questions, it was sought to bring out that the cars listed on page 1 of defendant's Ex. "B," R. 358, *"must"* leave Topeka on train No. 29 (R. 261, 270) and that the cars listed on page 2 of said exhibit known as the west short check *"had to go"* on train 91 and that the cars listed on the third page of said exhibit were to be moved on train 29 or 91 (R. 265), but on page 264 the witness (general yardmaster Robinson) voluntarily stated that the cars listed on page 3 of said exhibit were to be handled west in any train that would permit by tonnage or number of cars (R. 264) and night yardmaster Logan testified that none of the cars on page 3 had to go on train 29, that only the perishables "have to go" on that train (R. 486). AT-173233 was listed on line 23 of page 3 of defendant's Ex. "B" (R. 354).

That the testimony that the cars listed on page 1 of the yard check (defendant's Exhibit "B," R. 354), "must" leave on train No. 29, the date respondent was injured, and that those listed on page 2 thereof, known as the west short yard check, "has to go" on train No. 91, was incorrect is demonstrated by a comparison of the switch lists of trains 29 and 91 out of Topeka with the yard checks of the cars supposed to be moved on those trains and following for the ready reference of the court is a list of the cars shown on the switch lists of train 29 out of Topeka (Deft. Ex. "F," R. 502) as moving therein, which are also shown on pages 1 and 3 of Exhibit "B," (R. 354), the yard check, as designated in said yard check to move on train 29:

Page 1
Deft.'s Ex. "B,"
(R. 354)
29 Yard Check.

•AT	36349
• "	38389
•NOTM	3665
•MIL	90274
•AT	136246
•C&NW	144292
•GN	31091
•AT	27642
•RD	22568
"	30035
"	17904
"	17967
"	22609
"	20355
•AT	128698
• "	90534
•FCo	148835

Page 3
Dft.'s Ex. "B,"
West Yard Check,
(R. 354)

UTLX	52835
"	15324
"	6646
AT	99599
GN	30481
AT	190080
"	46007
"	28069
"	32535
"	190508
"	96610
"	49608
"	37990
"	235650
"	80261
† "	99923
Edrx	125
"	160
UTLX	95373
CONX	3627
AT	170146
"	173233

No cars on this list appear on switch list Train 29 out of Topeka, Defendant's Ex. "F," R. 502, except 99923.

Switch List Train 29 out of Topeka.
Deft.'s Ex. "F,"
(R. 502)

AT	58856
"	60442
"	116264
"	124367
"	116076
"	38467
"	126935
"	66478
"	244544
"	228372
"	66334
NATX	908
UNCX	221
AT	121789
"	128886
† "	99923
• "	90534
"	190508
• "	38389
• "	27642
•GN	31091
•C&NW	144292
•AT	136246
•Milw	90274
•Notm	3665
•FCo	148835
•RD	22568
•AT	128698
"	116359
SP	15318
CN	504504
•AT	36349
—	117723 ?
—	38961 ?

• Cars listed on page 1, Defendant's Ex. "B," R. 354, and on Defendant's Ex. "F," R. 502.

† Cars listed on page 3, Defendant's Ex. "B," R. 354, and Defendant's Ex. "F," R. 502.

Also, for the ready reference of the court we are showing a list of the cars shown on the switch list of train 91 out of Topeka, plaintiff's Ex. 18, R. 558, as moving therein, which are also shown on pages 2 and 3 of defendant's Ex. "B," R. 354, as designated in said yard check to move on train 91:

Page 3
Defendant's Ex. "B,"
(R. 354)
West Yard Check.

*UTLX	52835
* "	15324
* "	6646
AT	99599
*GN	30481
*AT	190080
"	46007
"	28069
"	32536
"	190508
"	96610
"	49608
* "	37990
* "	235650
"	80261
"	99923
*Edrx	125
* "	160
*UTLX	95373
CONX	3627
AT	170146
* "	173233

Page 2
Defendant's Ex. "B,"
(R. 354)
West Short Yard Check.
Train 91(?)

RD	20025
AT	117930
"	83404
"	174021
"	174220
"	171309
"	84574
"	174223

No cars on this list appear on switch list Train 91 out of Topeka, Plaintiff's Ex. 18, R. 558, or on switch list for Train 29 out of Topeka, Defendant's Exhibit "F," R. 502.

Switch List, Plaintiff's Ex. 18, R. 558, Train 91 out of Topeka.

*AT	190080
"	99785
"	58262
"	50112
"	50121
"	58582
"	57349
"	55805
"	57086
*UTL	15324
* "	52835
* "	6646
*Edrx	125
* "	160
*GN	30481
*UTL	95373
*AT	173233
"	49608
* "	37990
* "	235650
"	47742
"	26290
"	277978
CN&W	47646
AT	247853
"	122045
RD	19679

* Cars listed on page 3, Defendant's Ex. "B," R. 354, and on Plaintiff's Ex. 18, R. 556.

It will be further noted that only the cars listed on page one of the yard check (defendant's Exhibit "B," R. 354), are designated for any particular train, to-wit, for train 29, which is shown thereon. No other train number appears in connection with any of the other pages or lists of cars and the cars involved in this case do not appear on page 1 for movement on train 29 or on page 2 for movement on train 91 of said yard check.

By checking the cars on page 1 of defendant's Ex. "B" (R. 354), with defendant's Ex. "F," R. 502, being switch list of train 29 out of Topeka it can be accurately demonstrated that all the cars listed on said page and testified by petitioner's witnesses as cars that "must" (R. 261, 270) move on train 29 did not move out of Topeka on train 29, but that five cars, being RD-30035, 17904, 17967, 22609 and 20355, were left behind, they being bracketed on page 1 of defendant's Ex. "B" and marked "Hold for 29—11-26-36."

This bit of evidence in connection with the testimony of yardmaster Robinson that the tonnage and number of cars were limited on train 29 (R. 264) is evidence that at no time was the car of sand, AT-173233, which appeared on page 3 of defendant's Exhibit "B," intended to be moved on train 29 because the five cars above mentioned and regularly listed for movement on No. 29 were held for train 29 the following night, undoubtedly because by putting them in 29 on the night respondent was injured the load and car limits for train No. 29 would have been exceeded.

By checking the cars listed on pages 2 and 3 of defendant's Ex. "B" with the cars listed on plaintiff's Ex. 18, switch list of train 91 out of Topeka, it is accurately demonstrated that not a single car listed on page 2 of defendant's Ex. "B," and testified by respondent's witnesses as cars that "has to go on 91" (R. 265), moved out of Topeka on train 91, and that only 11 cars on page 3 of said exhibit left Topeka on train 91, and included in the 11 was car AT-173233 upon which respondent was injured. The petitioner's contention was that all of these cars must move either on 29 or 91.

These records demonstrate within themselves that the testimony of petitioner's witnesses that all the cars listed on page 1 of defendant's Exhibit "B" had to leave Topeka on train 29; that all the cars listed on page 2 had to leave Topeka on train 91 and that all the cars listed on page 3 had to leave Topeka on either 29 or 91, is wholly inaccurate and contrary to fact. These witnesses did not testify from their memory concerning these things, but testified that *that was what the switch lists and the yard checks showed.* This cancels the effect of their testimony in regard to the anticipated movement of these cars out of Topeka, and shows that the listing of the cars upon the yard checks was not their final designation for movement and this interpretation is strengthened by a reference to rule No. 384 appearing in plaintiff's Ex. 8 (R. 126).

Rule No. 384, plaintiff's Ex. 8, R. 126, which provided as follows:

*"'Rule No. 384. They must not take loaded cars without the waybill or take waybills without the freight or cars, unless authorized to do so by trainmaster. A conductor's waybill (Form 1854) must be made for car loads and less car loads in accordance with instructions printed on the form or issued by the auditor."

There is not a scrap of evidence in this record that a waybill or any kind of a bill was ever issued for any of these cars.

As stated heretofore, the only purpose the switch crew had in moving the tank car, AT-99923, was so they could take AT-173233 to the scale to be weighed, and this movement had no relation whatsoever to interstate transportation. It has been held that when a railroad employee was engaged in switching an interstate car for the sole purpose of reaching and moving an intrastate car that he did not come within the purview of the Federal Employers' Liability Act. *East St. L. Junction R. Co.* v. *Armour & Co.*, 247 Ill. App. 528, in which the appellate court said, l. c. 531:

"In the case at bar, the car in question had not yet started in interstate commerce and was not ready for transportation. We cannot agree with appellant's contention that appellee and Curry were engaged in interstate commerce at the time of the injury."

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* Petitioner did not abstract plaintiff's Exhibit 8 (R. 126) but it has been stipulated that the Court may consider Rule No. 384 in connection with the Transcript of Record.

In the case of *Pennsylvania R. Co.* v. *Donat,* 239 U. S. 50, 36 S. Ct. 4, it became necessary to uncouple the engine from two loaded interstate cars, attach it to two empty intrastate cars and remove them from the track upon which it was intended to place the two loaded interstate cars before the movement of the interstate cars could be completed, and this court held that Donat, who was injured while the two empty cars were being moved, was engaged in interstate transportation because the removal of the intrastate cars was necessary in order to complete the spotting of the interstate cars. The same principle was involved in the case of *East St. Louis Junction R. Co.* v. *Armour & Co.,* 247 Ill. App. 528, *supra,* except that the situation was reversed. In the latter case the plaintiff was assisting in moving an interstate car in order to reach and move an intrastate car and it was held that he was not engaged in interstate transportation. In the Donat case it was held that as plaintiff was assisting in moving intrastate cars in order to reach and move interstate cars he was engaged in interstate transportation.

Surely if a switchman is not engaged in interstate transportation when he is moving an interstate car for the purpose of reaching an intrastate car, he would not be engaged in interstate transportation when moving an intrastate car for the purpose of reaching another intrastate car, as was the case here. In the Donat case this court held that the question presented was "so frivolous as not to need further argument."

The movement in this case was entirely separate and distinct and had no connection whatsoever with the making up of a train, particularly train 29. The purpose, as stated by the switch foreman, was to take car AT-173233

to the scales to be weighed to determine whether or not it was overweight (R. 336). The fact that it had been weighed once before, found to be overweight and set in track 10 to have the weight reduced, is conclusive that such car would not be definitely designated to move on any train until it had been found to be within the weight capacity of the car. Therefore, the movement which was being made was entirely independent of interstate transportation. This was decided in the case of *Illinois Central R. Co.* v. *Behrens,* 34 S. Ct. 646, 233 U. S. 473, l. c. 647, 648, in which the court said:

> "* * * At the time of the collision the crew was moving several cars loaded with freight which was wholly intrastate, and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the state. The question of law upon which the Circuit Court of Appeals desires instruction is whether, upon these facts, it can be said that the intestate, at the time of his fatal injury, was employed in interstate commerce within the meaning of the employers' liability act.
>
> "* * * * *
>
> "Here, at the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

It appears to the respondent that this case is exactly in point and decisive of the character of respondent's employment.

In *Shanks* v. *Delaware, L. & W. R. Co.,* 239 U. S. 556, 36 S. Ct. 188, this court laid down the test for determining the character of the employment, and after pointing out that the act creating liability refers to the service being rendered when the injury was suffered and holding that the employment at that specific time was the only material matter, said:

> "Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see *Swift & Co.* v. *United States,* 196 U. S. 375, 398, 49 L. Ed. 518, 525, 25 Sup. Ct. Rep. 276), and that the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"

Thereafter this court in *Chi. & N. W. Ry. Co.* v. *Bolle,* 284 U. S. 74, 52 S. Ct. 59, reaffirmed the doctrine of the Shanks case.

In *C. B. & Q. R. R.* v. *Harrington,* 241 U. S. 177, the injured employee was engaged in taking coal from storage tracks to bins for the use of interstate locomotives and this court held that the service was not in interstate commerce. Mr. Justice Hughes, after repeating the test set up by the Shanks case, said:

"Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use. It has been held that an employee of the carrier, while he is mining coal in the carrier's colliery, intended to be used by its interstate locomotives, is not engaged in interstate commerce within the meaning of the federal act (*Delaware, L. & W. R. Co.* v. *Yurkonis,* 238 U. S. 439, 36 S. Ct. Rep. 160), and there is no distinction in principle between the two cases."

The test of the Shanks case has been reaffirmed by this court in other decisions and it has not been questioned in any. The Missouri Supreme Court applied this test and reached the conclusion that petitioner was not engaged in interstate commerce because of the remoteness of his work from actual transportation in interstate commerce. This conclusion, we think, decisions of this court sustain.

The Supreme Court of Missouri in the case of *Siegel* v. *M-K-T R. Co.,* 119 S. W. (2d) 376, certiorari den. 305 U. S. 654, 59 S. Ct. 249, 83 L. Ed. 423, reviews a great many cases decided by both federal and state courts and summarizes the law to be that the true test of employment in interstate transportation under the act is "was the employe at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it." The dominant object here to be attained was to weigh the car of sand, AT-173233. The car of water was between it and the engine (R. 344) so that they had to pull both cars out of track 10, kick the sand car up the cut-off, kick the water car back in track

10, and couple onto the sand car before they could take it up and weigh it (R. 359), and how this movement could be construed to be interstate in character is hard for the imagination to grasp. In the Siegel case the court held that the presence of interstate cars in an intrastate movement was merely incidental and did not impress the movement with an interstate character. Here there were no interstate cars in the movement.

This is particularly true in view of the testimony of switch foreman Vandeventer, appearing on page 359 of the record, in which he stated that after they had weighed the car of sand, which it is strenuously contended was to be incorporated in train No. 29 for movement out of Topeka that night, they were going to bring it back down past track No. 10, upon which was located the water car, and dispose of it, but that at that time *he had no intention of switching the water car.* This circumstance merits the court's attention, for by a reference to Exhibits 2 (R. 22) and 6 (R. 88) the court will note that the shortest, quickest and easiest way to switch the car of water, which was located on track No. 10, would be to couple onto it when they went back down past it with the car of sand, if they were both going to be put in train 29, and thereby place both cars upon the track (No. 2 as stated by petitioner) upon which train 29 was being made up, and, therefore, avoid an extra trip back to the same place. This circumstance is almost conclusive that there was no intention at the time the car of sand was being moved to place it in the same train in which they were going to place the car of water and the car of water was placed in train 29 and the car of sand disposed of elsewhere in the yards awaiting further instructions.

In the case of *Jarvis* v. *C. B. & Q.*, 37 S. W. (2d) 602, cert. den. 284 U. S. 635, 76 L. Ed. 540, 52 S. Ct. 19, the plaintiff was assisting in taking a train of empty cars from Centralia, Illinois, to Ziegler, Illinois, with orders to leave the empties at that point and assist in moving a train load of coal containing cars moving interstate. He was injured enroute to Ziegler, brought suit under the Federal Employers' Liability Act, and recovered a judgment which was reversed, the court saying, l. c. 606-7:

> "How can we say that plaintiff was engaged in interstate commerce at the time he was injured when there is no proof that either at that time or at the time the order was received at Centralia any interstate car or cars had been grouped or assigned to his engine and crew for movement? *A train crew proceeding under an order merely to move a car intrastate is not employed in interstate commerce unless and until such car is billed, designated, or assigned for use in interstate commerce.* Also, in Roberts' Federal Liabilities of Carriers (2d Ed.), p. 1455, it is said: 'It is essential, however, that the equipment being prepared for service or movement shall have been definitely assigned or designated for interstate work. Unless such assignment or designation appears, there is no basis for asserting any such relation with interstate transportation as will bring the employee concerned under the protection of the act.'
>
> "The same course of reasoning suggests that a train crew proceeding under an order merely to move a train of cars intrastate is not employed in interstate commerce unless and until one or more interstate cars are assigned to that crew for movement. The order is merely to move a train of cars which may or may not be in interstate commerce, depending upon whether or not the train will include one or more interstate

cars. Until the train itself thus becomes an instrumentality of interstate commerce, nothing preparatory to or in aid of its movement is interstate commerce." (Italics ours.)

In the case of *Phillips* v. *Union Terminal R. Co.*, 40 S. W. (2d) 1046, cert. den. 284 U. S. 660, 76 L. Ed. 559, 52 S. Ct. 36, plaintiff was injured while removing intrastate cars which he had left on a crossing to hasten the delivery of some interstate cars, and after delivery of the interstate cars immediately returned to open the crossing. In this case it was contended that he was engaged in interstate transportation, but the Supreme Court of Missouri, in denying him a recovery under the Federal Employers' Liability Act, held, l. c. 1047-8:

"Plaintiff controlled the order of the different movements directed by the switch list, and it may be that the delivery to the Great Western was hastened by deferring the opening of the crossing. If so, the act of deferring the opening of the crossing was in furtherance of interstate commerce, for it occurred before the completion of the movement in interstate commerce. But after the delivery of the cars to the Great Western there was no interstate movement with which the movement of the cars to open the crossing could be connected. How could a movement of cars be connected with no movement? Furthermore, after the delivery of the interstate cars, the fact that the crossing was blocked did not further or interfere with a movement or movements in interstate commerce. We do not think plaintiff was employed in interstate commerce at the time of his injury. The court should have directed a verdict for defendant."

As held in the case of *Siegel* v. *M-K-T R. Co.*, 119 S. W. (2d) 376, l. c. 379, Cert. Den. 305 U. S. 654, 59 S. Ct. 249, 83 L. Ed. 423, *supra*, the respondent in this case had occasion to frequently pass from service in one class of transportation to another in the performance of his daily duties. The switching of the car of water in order to reach the car of sand did not partake of respondent's work as a whole but was particularized by the character of the cars involved and he was plainly not engaged in interstate transportation at the time of his injury.

In the case of *Erie R. Co.* v. *Welsh*, 37 S. Ct. 116, 242 U. S. 303, the plaintiff, immediately prior to his injury, had been engaged in switching cars moving in interstate commerce and had stopped at the yard office to report for further orders and in holding that at the time of his injury he was not engaged in interstate transportation this court said, l. c. 117-18:

> "It was in evidence, also, *that the orders plaintiff would have received* had he not been injured on his way to the yardmaster's office *would have required him immediately to make up an interstate train.* Upon the strength of this it is argued that his act at the moment of his injury partook of the nature of the work that, but for the accidental interruption, he would have been called upon to perform. In our opinion, this view is untenable. By the terms of the Employers' Liability Act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act. * * *" (Italics ours.)

In the case of *Poindexter* v. *C. C. C. & St. L. R. Co.*, 4 S. W. (2d) 1065, cert. den. 278 U. S. 622, 49 S. Ct. 29, 73 L. Ed. 543, plaintiff was employed to inspect and repair such bad order cars as he found if such cars could be put in condition by light repair in the yards of defendant at Terra Haute, Indiana.

The morning that plaintiff was injured two empty Pennsylvania coal cars had been shunted onto track No. 9, they being the first cars put thereon that day, and were the only ones taken out of the local freight train which were placed on that track. On one of these cars was a coupler that required attention and repair. Later an empty box car was spotted within a few feet of the coal car and still later an empty box car and a car loaded with gravel were switched onto track No. 9, but an open space had been left between the coal cars and these three cars in order that plaintiff might repair the defective coupler, which at no time had been coupled onto the other three cars. The car loaded with gravel was enroute to Caseyville, Illinois, and was put on track 9 for delivery to the Pennsylvania as a connecting carrier. The two box cars were put on that track in compliance with requisitions made through the Pennsylvania for interstate shipments, the destination being stated in the orders. The empty coal cars, one of which had a defective coupler, were brought into appellant's yard in local freight train which came from Indianapolis and belonged to the Pennsylvania. While repairing the coupler plaintiff was injured and obtained a judgment under the Federal Employers' Liability Act, which the court reversed, saying, l. c. 1067:

"If Poindexter at the time of his injury had been making his rounds for the purpose of inspecting indiscriminately both interstate and intrastate cars, he would unquestionably have been employed at that time in interstate commerce. But he had stepped aside from his general line of duty and was engaged in a specific work, namely, repairing a coupler on an intrastate car. This car was not a part of an interstate train. If the string of cars that the Pennsylvania hauled daily from appellant's yard to its own be considered a 'train,' then the 'train' for November 4th had not been completed but was being made up at the time of Poindexter's injury. *The intrastate car on which he was working had never been put into the train.* It had purposely been left disconnected from the other cars in order that he could work on it and thereby put it in condition to go into the train. *As a unit of transportation, that car was in no way related to the interstate cars standing on the same track.* Their handling and movement was in no respect dependent upon the intrastate car being put in order or moved. The mere custom of coupling together both interstate and intrastate cars in order that all could be hauled with one movement from one railroad yard to the other could not of itself have made a preliminary repair on one of the interstate cars a work in furtherance of interstate commerce. • • •

"As there was no evidence tending to show that the repairing of the coupler on the intrastate car was designed to, or did, in any respect, aid or further the interstate commerce in which appellant was engaged, there was a failure of proof that the deceased at the time of his injury was employed in interstate commerce within the meaning of the statute." (Italics ours.)

The cases of *B. & O. R. Co.* v. *Darling,* 3 Fed. (2) 987, and *Pennsylvania R. Co.* v. *Morrison,* 3 Fed. (2) 986, relied upon by petitioner, have no significance here. They were distinguished in the case of *Grigsby* v. *So. R. Co.,* 3 Fed. (2) 988, l. c. 990; cert. den. 268 U. S. 704, 45 S. Ct. 638, 69 L. ed. 1166.

It will be observed that the opinions in the Morrison, Darling and Grigsby cases were all written by Judge Mack and that all of his associates concurred in all of the opinions. In distinguishing the Grigsby case from the Darling and Morrison cases Judge Mack said, l. c. 990:

> "* * *; that at the time of the accident the return with loaded cars was within the contemplation and intention of the parties under this order; that such loaded cars ordinarily on such trips included interstate cars; that in fact on this return trip interstate cars were actually hauled. The record, however, fails to show that the interstate cars so hauled were billed as interstate cars at the time of the switching accident in the morning; on the contrary, it is testified that customarily the billing is done in the afternoon.
>
> "* * *
>
> "In the recent cases of *Pennsylvania R. R. Co.* v. *Morrison,* 3 F. (2) 986 (decided January 5, 1925), and *Baltimore & Ohio R. R. Co.* v. *Darling,* 3 F. (2) 987 (decided February 4, 1925), we have held that a switch movement of intrastate cars, made for the very purpose of connecting with interstate cars and thereafter forming an interstate train, is a movement in interstate commerce; but in those cases *the connection was direct and immediate.* In the present case, while the accident on the going trip might have delayed or affected the interstate return trip, the connection between the two is not such as, in our judgment,

would justify changing the character of what would otherwise clearly be an intrastate train and an accident governed by state law into an interstate train and an accident governed by federal law; Grigsby was not at the time of his death engaged either in interstate transportation or in work so closely related thereto as to be practically a part thereof. See *Illinois Central R. Co.* v. *Peery,* 242 U. S. 292, 37 S. Ct. 122, 61 L. Ed. 309.

"Judgment affirmed."
(Italics ours.)

In the case of *Mayor* v. *Cent. Vt. Ry. Co.,* 26 Fed. (2d) 905, cert. den. 49 S. Ct. 26, the crew of an interstate train was directed to switch a local car from one siding to another. The locomotive was detached from the train and while on a parallel track by means of a stake moved a car on the siding toward its connection with the main track. When the car was partly through the switch plaintiff, a brakeman on the interstate train, was injured. The car was then coupled to the front of the locomotive which was again coupled to the train and the train moved onto a siding to permit the passage of another interstate train. Thereafter the train moved the intrastate car forward for some distance, placed it on a side track and continued its interstate journey, and it was held that plaintiff could not recover under the Federal Employers' Liability Act as his service in interstate commerce was interrupted and his injury did not occur while he was engaged in interstate commerce, the court saying, l. c. 906:

"The undisputed evidence is that the plaintiff was a brakeman employed on an interstate freight train operated by the defendant. On reaching a way station at Monson, Mass., plaintiff was directed

> by the conductor of the train to assist in a local switching operation. This consisted of removing a certain freight car from a side track and placing it on another siding, where it would be available to its consignee. The car and its contents were concededly in intrastate commerce; the movement was in no way connected with interstate commerce, except for the fact that it was to be accomplished by the interstate train. The car had never been part of that train, and the movement was not for the purpose of getting at other cars, but solely for the purpose of completing the intrastate shipment."

There can be no question that the dominant task being performed by respondent and petitioner at the time respondent was injured was purely intrastate, to-wit, merely moving the tank car so as to get to the car of sand to take it to be weighed; that the pulling of both cars out of track 10 and kicking the car of sand up the cut-off and replacing the car of water upon track 10 was purely intrastate and had no connection of any description with the making up or the placing of cars in trains 29 or 91 cannot be disputed, and even if it did relate somewhat to interstate commerce such relation was a mere incident to the dominant movement. This was held in the case of *Rice* v. *B. & O. R. Co.*, 42 Fed. (2d) 387, the court saying, l. c. 391:

> "* * *. In the instant case the dominant task of Rice's crew was intrastate—he was injured in a movement which, while instantly related to interstate commerce, still was a mere incident to the real duty, nothing more than a casual circumstance not necessary to the full execution of the dominant task, for it does not appear that the crew was bound to collect at one time more cars than the cut-off switch could accommodate."

Petitioner in its brief and statement of facts continually asserts that the car of sand was billed and assigned for transportation on an interstate train, to-wit, either train 29 or train 91. This statement is iterated and reiterated throughout the petition and brief. There was no evidence in the record that pursuant to Rule 384, plaintiff's Exhibit 8 (R. 126), any waybill had been issued for either of these cars. The defendants knew all the steps that had been taken to determine the movement of these cars and if any waybills had been issued pursuant to Rule 384 at the time of respondent's injury they should have produced them, and, in having failed to inform the court and to produce all the evidence in their possession upon this point, they cannot complain that they have been deprived of a federal right, *Osborne* v. *Gray,* 241 U. S. 16, 36 S. Ct. 486, 487, 60 L. ed. 865, and its failure to produce such evidence justifies the inference of inability to combat the facts and circumstances showing respondent's employment in intrastate transportation. *Mammoth Oil Co.* v. *U. S.,* 275 U. S. 13, 48 S. Ct. 1, 72 L. Ed. 137. It is superfluous to say that if any such billing as claimed by petitioner had been issued which would in any way have assisted petitioner in establishing its claim that the car or cars in question were interstate in character, or billed for movement upon an interstate train, that the same would have been produced in court, witness the production of the yard checks and the switch lists, but it was left to the uncertain and faulty memories of witnesses who gave verbal testimony in answer to the most leading questions of counsel as to what was to be done with the car of sand and they, in turn, testified contrary, in some instances, to the records which they themselves produced.

If petitioner's theory be correct, as set forth on pages 30 to 34, inclusive, of its brief, particularly on page 34, then every preparation of a car moving wholly intrastate would characterize it as moving in interstate commerce from the mere fact that sometime in the future it might be moved in a train containing interstate shipments. Such preparation would include the designation of the car, the moving of the same to the place to be loaded, the loading thereof, the switching therefrom, the weighing thereof, the inspection thereof and the spotting thereof upon the classification tracks, long before it had ever been designated for movement in a particular train. In other words, if it were then hauled in a train consisting wholly of intrastate shipments it would be characterized as an intrastate car from the time of its designation for use, and if it were hauled in a train containing interstate shipments, it would then be an interstate car from the time of its said designation. Such a refinement of reasoning would thwart the purpose and certainty of the law as the character of the shipment would be changed from intrastate to interstate according to the whim or caprice of the designating officer or employee, and the character of the car would be changed every time such employee or officer changed his mind as to the train upon which it would be hauled. It is absurd to attribute to Congress an intention to impress interstate or intrastate transportation with such chameleon-like characteristics.

None of the cases cited by petitioner sustain its contention and the few excerpts quoted from cited cases are merely generalities with which everyone can agree. Respondent, therefore, earnestly submits that no evidence whatever was produced of his employment in interstate commerce at the time of his injury and that the writ should be denied.

B.

Petitioner cannot now be heard to complain that its evidence showed employment in interstate transportation as a matter of fact.

It has been petitioner's contention all through the proceedings herein that the sand car was being moved for the purpose of incorporating it in an interstate train and that by the unexecuted intention of the switch foreman it became impressed with the characteristics of interstate commerce to such an extent that it, in turn, so characterized respondent's employment. Certainly under the evidence the theory was far fetched and under no stretch of the imagination would the court have been authorized to direct the jury that as a matter of law respondent was engaged in interstate transportation at the time of his injury, yet that is what the petitioner did by its Instruction "H" (R. 616).

It told the jury that as a matter of law both the respondent and the petitioner were at the time of petitioner's injury engaged in interstate transportation or in work so closely connected therewith as to be and become a part of it and that the rights of both the respondent and the petitioner were governed and controlled by the Federal Employers' Liability Act and its amendments and the decisions of the federal courts construing said Act. This instruction was refused by the court and petitioner never requested an instruction from the court submitting the evidence to the jury for its determination as to whether or not respondent was employed in interstate transportation as a matter of fact at the time of his injury. Respondent's instruction did not require a finding by the jury either one way or the other and petitioner, by its failure to request an instruction submitting the evi-

dence to the jury in regard to respondent's employment for its determination treated the question as one of law for the trial court and consequently cannot here urge that the court should have submitted it to the jury. This is held in the case of *Western Industries Co.* v. *Mason M. W. Dist. Co.,* 205 Pac. 466, and in the case of *L. & N. R. Co.* v. *Nathan Parker,* 242 U. S. 13, 37 S. Ct. 4, the same question arose and this court in regard thereto said, l. c. 5:

> "The business upon which the deceased was engaged at the moment was transferring an empty car from one switch track to another. This car was not moving in interstate commerce, and that fact was treated as conclusive by the court of appeals. In this the court was in error, for if, as there was strong evidence to show, and as the court seemed to assume, *this movement was simply for the purpose of reaching and moving an interstate car,* the purpose would control and the business would be interstate * * *, as in *Illinois C. R. Co.* v. *Behrens,* 233 U. S. 473, 478, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163, 10 N.C.C.A. 153, * * *. See *New York C. & H. R. R. Co.* v. *Carr,* 238 U. S. 260, 263, 59 L. ed. 1298, 1299, 35 Sup. Ct. Rep. 780, 9 N.C.C.A. 1; *Pennsylvania Co.* v. *Donat,* 239 U. S. 50, 60, L. ed. 139, 36 Sup. Ct. Rep. 4; *Kalem Co.* v. *Harper Bros.,* 222 U. S. 55, 62, 63, 56 L. ed. 92, 95, 96, 32 Sup. Ct. Rep. 20, Ann. Cas. 1913A, 1285.
>
> "But it is necessary to see how the case was dealt with in the trial court. The railroad company did not ask to go to the jury on the question whether the deceased was engaged in interstate commerce. It simply asked the court to direct a verdict, on the ground, among others, that it appeared as a matter of law that he was so engaged. But if the question had been left to the jury, and they had disbelieved that testimony that the empty car was moved

> for the ulterior purpose of interstate commerce, there would have been no error of law in allowing a verdict for the plaintiff to stand. It is true that the judge seems to have assumed that the business in hand was intrastate, but the only objection indicated was to his not ruling the contrary; and, as the railroad did not ask to go to the jury, and the only ruling requested was properly denied, the judgment must stand." (Italics ours.)

Where the only objection was the court's failure to rule with petitioner and as the most petitioner's evidence tended to show in regard to the character of respondent's employment would only make a jury question, the court did not err in refusing defendant's Instruction "H."

If respondent was not engaged in interstate transportation then, of course, under the Kansas Act, the defenses of contributory negligence and assumption of risk are eliminated and if the question of respondent's employment in interstate transportation was one for the jury then there would have to be a finding by the jury that respondent was engaged in interstate transportation before it would be proper for the court to give petitioner's requested instructions I, J and K. This matter is self-evident and even if respondent's employment in interstate transportation was a question for the jury, petitioner, by not requesting an instruction hypothesizing the evidence upon that question, has precluded itself from being entitled to instructions on contributory negligence and assumed risk.

Petitioner, therefore, by not offering an instruction hypothesizing the facts which it claimed showed respondent's employment in interstate transportation has waived the question of the character of such employment.

Conclusion.

Respondent submits that there was no evidence whatsoever adduced that respondent was engaged in interstate transportation as a matter of law; that there was no evidence adduced sufficient to submit to the jury the question of his employment in interstate transportation as a matter of fact and even had there been such evidence to submit to the jury petitioner by its own act has precluded itself from claiming error on the part of the trial court in not submitting its defenses of assumed risk and contributory negligence without first finding petitioner was employed in interstate transportation.

Respectfully submitted,

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